SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 46

UNITED STATES OF AMERICA, PETITIONER

v.

JAMES A. WHITE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

INDEX

	Page
Docket Entries (66 C R 254)	1
Docket Entries (66 C R 255)	8
Indictment (66 C R 254)	14
Indictment (66 C R 255)	17
Transcript of Trial Proceedings commencing on November 16, 1966 (excerpts)	19
Testimony of Carl L. Jackson	19
Testimony of Robert J. De Fauw	40
Testimony of William G. Kerstann	72
Testimony of David Joseph Connolly	81
Testimony of Robert J. De Fauw	84
Testimony of Arthur Lewis	85
Testimony of Vernon D. Meyer	86
Testimony of Kenneth Cloud	89

	Page
Oral Motion of Mr. Eskridge	91
Testimony of Canister Moore	92
Testimony of Mary Jackson	102
Offer of Defendant's Exhibits	117
Initial Opinion of the Court of Appeals	119
Opinion of the Court of Appeals *en banc*	128
Judgment	154
Order granting petition for writ of certiorari	156

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

DOCKET ENTRIES

66 C R 254

THE UNITED STATES,

v.

JAMES A. WHITE.
SAM MINERVA.

* * * * *

Date	Proceedings
4/18/66	Filed Indictment
*	* * * *
4/18/66	Order indictment returned in open court, bond posted in 66 CR 34 to stand as bond in this instance —Campbell, J.
4/19/66	Defendant White, with counsel, enters plea of not guilty. Defendant White given ten (10) days to file any motions he may deem appropriate. Government given five (5) days thereafter to reply to motions. Disposition of motions, if filed, set for May 13, 1966 at 2:00 P.M. Cause set for trial as to both Defendants on June 1, 1966 at 10 A.M. Cause as to Defendant Sam Minerva set for April 25, 1966 at 10 A.M. for arraignment and plea. Bail of Defendant White of $25,000.00 posted in Cause 66 CR 34 shall stand as bail for Defendant White in Cause 66 CR 254. —Hoffman, J.
4/25/66	Cause continued to May 13, 1966 at 2 P.M. for arraignment and plea as to Defendant Minerva.—Hoffman, J.
5/6/66	Filed Appearance of Stanley A. Bass as Counsel for Defendant White with Affidavit Under G. R. 39.
5/13/66	On motion of Defendant White for leave to file

Date	Proceedings
	instanter pre-trial motions, (1) Motion for Bill of Particulars, (2) Motion for preliminary hearing or, in the alternative, Petition for Writ of Mandamus and Memorandum of Law in Support of motion, denied, because not timely.—HOFFMAN, J.
5/13/66	Cause as to Defendant Minerva continued to June 1, 1966 at 10 A.M. for arraignment and plea.—HOFFMAN, J.
5/27/66	Filed notice of motion and motion for continued date for trial.
5/27/66	On motion of Defendant, Cause reset from June 1, 1966 at 10 A.M. to June 6, 1966 at 10 A.M. for trial.—Hoffman, J.
6/6/66	Filed appearance of Chauncey Eskridge as attorney for James A. White and affidavit re G R 39.
6/6/66	Cause continued to June 14, 1966 at 10 A.M. for trial as to Defendant White. Cause as to Defendant Minerva continued to June 27, 1966 for arraignment and plea.—Hoffman, J.
6/14/66	Cause continued to June 20, 1966 at 10 A.M. for trial as to Defendant White.—Hoffman, J.
6/20/66	Cause continued to June 27, 1966 at 10 A.M. for trial as to Defendant White.—Hoffman, J.
6/27/66	Cause continued to September 13, 1966 at 10 A.M. for trial as to Defendant White and for arraignment and plea as to Defendant Minerva.—Hoffman, J.
7/5/66	Filed Notice and Motion re defendant's motions (to JJH).
7/11/66	Defendants motion to reconsider and grant leave to file motions is entered and continued to September 13, 1966.—Austin, J.
9/13/66	Motion of Defendant James A. White that this Court reconsider and grant said Defendant leave to file motions heretofore presented and denied because not timely filed, is, hereby, denied.—Hoffman, J.
9/13/66	Cause continued to September 27, 1966 at 10 A.M. for trial as to Defendant White and for arraignment and plea as to Defendant Minerva.—Hoffman, J.

Date	Proceedings
9/20/66	Motion of Defendant James A. White for restraining order denied, for failure to comply with local rules.—Hoffman, J.
9/27/66	Cause continued to September 28, 1966 at 10 A.M. for trial as to Defendant White and for arraignment and plea as to defendant Minerva.—Hoffman, J.
9/28/66	Cause continued to October 4, 1966 at 10 A.M. for trial as to defendant White and for arraignment and plea as to Defendant Minerva.—Hoffman, J.
10/4/66	Cause continued to October 5, 1966 at 10 A.M. for trial as to Defendant White and arraignment and plea as to Defendant Minerva.—Hoffman, J.
10/5/66	Cause continued to October 13, 1966 at 10 A.M. for trial as to Defendant White and for arraignment and plea as to Defendant Minerva.—Hoffman, J.
*9/20/66	Filed Motion for Restraining Order, Notice, and Memorandum in support of Motion for Restraining Order of Defendant James A. White. (To JJH) (66 CR 255)
10/13/66	Cause continued to Oct. 20, 1966 at 10 A.M. for trial as to defendant White and for arraignment and plea as to defendant Minerva.—Hoffman, J.
10/13/66	Cause continued to Oct. 20, 1966 at 10 A.M. for trial as to defendant White and for arraignment and plea as to defendant Minerva.—Hoffman, J.
10/20/66	Cause continued to October 27, 1966 at 10 A.M. for trial as to Defendant White and arraignment and plea as to Defendant Minerva.—Hoffman, J.
10/27/66	Cause continued to November 2, 1966 at 10 A.M. for trial as to defendant White and for arraignment and plea as to Defendant Minerva.—Hoffman, J.
11/2/66	Cause continued to November 16, 1966 at 10 A.M. for trial as to Defendant White and for arraignment and pleas to Defendant Minerva.— Hoffman, J.
11/4/66	Filed Notice.
11/4/66	Filed Motion for consolidation of indictments (To: JJH)

Date	Proceedings
11/9/66	Filed Notice of motion and motion for separate trial for White (To JJH)
11/9/66	By agreement, motion to consolidate indictments 66 CR 255 and 66 CR 254 for trial, allowed.—Hoffman, J.
11/9/66	Leave to Defendant White to file instanter his motion to sever defendants and counts. Government given five (5) days to file memorandum in opposition to motion.—Hoffman, J.
11/10/66	(By agreement: motion of the Government to sever Sam Minerva from Counts 1, 2, 3, 4 and 6 of Indictment No. 66 CR 254 allowed, and motion of the Government to dismiss Count 5 of Indictment 66 CR 254 allowed.) Defendant White's motion for a separate trial on Counts 5 and 6 of Indictment No. 66 CR 254, or in the alternative, that the Government be compelled to elect between said Counts and other Counts contained in Indictment Nos. 66 CR 254 and 66 CR 255 is hereby denied. U.S. Attorney directed to prepare and submit draft order on Monday, November 14, 1966 at 10 A.M.—Hoffman, J. (Also on 66 CR255)
11/14/66	Ordered that in Counts 1, 2, 3, 4, and 6 of Indictment No. 66 CR 254, the defendant, Sam Minerva, be severed from the defendant James A. White, for purposes of trial of James A. White; and further, that Count 5 of Indictment 66 CR 254 be dismissed. Further ordered that defendant James A. White's motion for a separate trial on Counts 5 and 6 of Indictment 66 CR 254 or in the alternative, that the Government be compelled to elect between said Counts and other Counts contained in indictment Nos. 66 CR 254 and 66 CR 255, is hereby denied. (DRAFT)—Hoffman, J. (Also on 66 CR 255)
11/16/66	Cause called for as to Defendant White. Jury selected and sworn. ******** Opening statements heard for the Government. Defendant waives opening statement. Evidence heard in part for the Government. Cause continued to November 17, 1966 at 10:00 A.M.—Hoffman, J.

Date	Proceedings
11/17/66	Leave to attorney Stanley Bass to withdraw as associate Counsel for defendant with the agreement of the defendant made in open Court. Further evidence heard for the Government. Cause continued to November 18, 1966 at 10 A.M.—Hoffman, J.
11/18/66	Further evidence heard for the Government. Cause continued to November 21, 1966 at 10:00 A.M.—Hoffman, J.
11/21/66	Further evidence heard for the Government. Government rests. Motion of Defendant to dismiss Count #3 of Indictment 66 CR 254 denied. Motion of Defendant to dismiss Count #4 of Indictment 66 CR 254 denied. Motion of Defendant to dismiss all counts of Indictments 66 CR 254 and 66 CR 255 denied. Evidence heard in part for Defendant. Cause continued to November 22, 1966 at 10 A.M.—Hoffman, J.
11/22/66	Further evidence heard for Defendant. Defendant rests. No rebuttal evidence, both sides rest. Defendants renewed motions unsupported by argument and not restated made, or rather the motions made at the close of the Governments case, denied. Arguments heard. The Court instructs the jury, alternates discharged, Marshals sworn. Jury retires to consider its verdict or verdicts. (By agreement, jury to sign, seal and separate, polling of jury waived. DRAFT) Marshal ordered to furnish supper for twelve (12) jurors and two (2) deputy Marshals. Cause continued to November 23, 1966 at 10 A.M. —Hoffman, J.
11/23/66	Filed verdict of guilty for James A. White.
11/23/66	Defendant fails to appear. Enter order of bond forfeiture as to Defendant White in consecutive cases 66 CR 254 and 66 CR 255 respectively and Bench warrant to issue. (Ordered Chauncey Eskridge, attorney for defendant, is ordered held in direct contempt of this Court for failure to appear, as aforesaid, and he is fined $100.00 and costs and remanded to the custody of the U.S. Marshal until such fine is paid. (DRAFT)). The Jury returns the following verdicts. In Cause 66 CR 254—We, the Jury, find

Date	Proceedings
11/23/66	the defendant James A. White, guilty as charged in the indictment. In cause 66 CR 255, We, the Jury, find the defendant James A. White guilty as charged in the Indictment. Judgements on verdicts in Cause 66 CR 254 and 66 CR 255 respectively. Cause continued to November 30, 1966 at 10 A.M. for disposition, and/or disposition of motions which may be made or filed. Defendant remanded to the custody of the U.S. Marshal. On motion of respondent Eskridge, order and judgment holding respondent Eskridge in contempt be and is vacated and set aside., etc. Motion of Defendant for his enlargement on bail pending disposition set for November 30, 1966, denied. Motion of Defendant to vacate order of bond forfeiture and to recall Bench warrant denied.—Hoffman, J.
11/29/66	Filed appearance of William R. Ming, Jr. as additional counsel for James A. White and affidavit re G R 39
11/28/66	Filed Motion for judgment of acquittal and/or for new trial. Filed motion to vacate forfeiture of bail (Both for White)
11/30/66	Filed information setting forth prior conviction of James A. White.
11/30/66	Motion of Defendant for judgment of acquittal notwithstanding the verdict denied. Alternate motion for a new trial denied. Leave to the Government to file Information setting forth prior conviction of Defendant White and certified copy of Judgment and Commitment, in 55 CR 51. In cause 66 CR 254, Defendant White committed to the custody of the Attorney General for imprisonment for a period of 25 years on each of Counts 1, 2, 3, 4 and 6 of the Indictment and fined $5,000.00 on each of said Counts 1, 2, 3, 4 and 6 and costs of prosecution. Sentences shall run concurrently and fines cumulative. Defendant stand committed until fines and costs are paid. In Cause 65 CR 255 Defendant White committed to the custody of the Attorney General for imprisonment for a period of twenty-five (25) years on each of Counts 1 and 2 of the

Date	Proceedings
11/30/66	Indictment. and fined $5,000.00 on each of said counts 1 and 2 and costs of prosecution. Sentences shall run concurrently and fine cumulative. Defendant stand committed until fines and costs are paid, etc. Sentences this day imposed as to Defendant White in cause 66 CR 255 shall run concurrently with the sentences imposed on said Defendant in cause 66 CR 254. Fines assessed against Defendant White in cause 66 CR 255 shall be cumulative to the fines assessed against Defendant in cause 66 CR 254. Defendant committed to the custody of the U.S. Marshal without bail. Defendant's motion to vacate order of bond forfeiture allowed. Defendant's motion to permit Defendant to be confined to the Cook County Jail for duration of his appeal denied. (2 DRAFTS)—Hoffman, J.
* * * * *	
11/30/66	Cause continued to December 1, 1966 at 10 A.M. for an arraignment and plea as to Defendant Minerva.—Hoffman, J.
12/1/66	Cause continued to January 3, 1967 at 10 A.M. for report and for disposition.—Hoffman, J. (Minerva)
* * * * *	
12/8/66	Filed Notice of Appeal of defendant White
* * * * *	

DOCKET ENTRIES

66 C R 255

THE UNITED STATES,

v.

JAMES A. WHITE.

* * * * *

Date	Proceedings
4/18/66	Filed Indictment
*	* * * *
4/18/66	Order indictment returned in open court; bond posted in 66 CR 34 to stand as bond in this instance —Campbell, J.
4/19/66	Defendant, with Counsel, enters plea of not guilty. Defendant given ten (10) days to file any motions he may deem appropriate. Government given five (5) days thereafter to reply to motions. Disposition of motions (if filed) set for May 13, 1966 at 2 P.M. Cause set for trial on June 1, 1966 at 10 A.M. Bail of Defendant White of $2500.00 posted in Cause 66 CR 34 shall stand as bail for defendant in cause 66 CR 255.—Hoffman, J.
5/6/66	Filed Appearance of Stanley A. Bass as counsel for Defendant White with Affidavit Under G. R. 39.
5/13/66	Defendant's motion for leave to file instanter pre-trial motions for Bill of Particulars denied because not timely.—Hoffman, J.
5/27/66	Filed notice of motion and motion to continued date for trial.
5/27/66	On motion of Defendant, cause reset from June 1, 1966 at 10 A.M. to June 6, 1966 at 10 A.M. for trial.—Hoffman, J.
6/6/66	Filed appearance of Chauncey Eskridge as attorney for James A. White and affidavit re G R 39.
6/6/66	Cause continued to June 14, 1966 at 10 A.M. for trial.—Hoffman, J.

Date	Proceedings
6/14/66	Cause continued to June 20, 1966 at 10 A.M. for trial.—Hoffman, J.
6/20/66	Cause continued to June 27, 1966 at 10 A.M. for trial.—Hoffman, J.
6/27/66	Cause continued to September 13, 1966 at 10 A.M. for trial.—Hoffman, J.
7/5/66	Filed Notice and Motion re defendant's motions. (to JJH)
7/11/66	Defendant's motion to reconsider and grant leave to file motions is entered and continued to September 13, 1966.—Austin, J.
9/13/66	Motion of Defendant James A. White that this Court reconsider and grant said Defendant leave to file motions heretofore presented and denied because not timely filed is hereby denied.—Hoffman, J.
9/13/66	Cause continued to September 27, 1966 at 10:00 A.M. for trial.—Hoffman, J.
9/20/66	Motion of Defendant James A. White for restraining order denied for failure to comply with local rules.—Hoffman, J.
9/27/66	Cause continued to September 28, 1966 at 10 A.M. for trial.—Hoffman, J.
9/28/66	Cause continued to October 4, 1966 at 10 A.M. for trial.—Hoffman, J.
10/4/66	Cause continued to October 5, 1966 at 10 A.M. for trial.—Hoffman, J.
10/5/66	Cause continued to October 13, 1966 at 10 A.M. for trial.—Hoffman, J.
9/20/66	Filed Motion for Restraining Order, Notice, and Memorandum in Support of Motion, for Restraining Order of Defendant James A. White. (To JJH) (66 CR 254)
10/13/66	Cause continued to Oct. 20, 1966 at 10 A.M. for trial.—Hoffman, J.
10/20/66	Cause continued to October 27, 1966 at 10 A.M. for trial.—Hoffman, J.
10/27/66	Cause continued to November 2, 1966 at 10 A.M. for trial.—Hoffman, J.
11/2/66	Cause continued to November 16, 1966 at 10 A.M. for trial.—Hoffman, J.

Date	Proceedings
11/4/66	Filed Notice of motion.
11/4/66	Filed Motion for consolidation of indictments (To: JJH) (66 CR 254)
11/9/66	Filed notice of motion and motion for separate trial. (To JJH)
11/9/66	By agreement, motion to consolidate indictments 66 CR 255 and 66 CR 254 for trial, allowed.—Hoffman, J.
11/9/66	Leave to Defendant White to file instanter his motion to sever defendants and counts. Government given five (5) days to file memorandum in opposition to motion.—Hoffman, J.
11/10/66	(By agreement, motion of the Government to sever Sam Minerva from Counts 1, 2, 3, 4, and 6 of Indictment No. 66 CR 254 allowed, and motion of the Government to dismiss Count 5 of Indictment 66 CR 254 allowed.) Defendant White's motion for a separate trial on Count 5 and 6 of Indictment 66 CR 254, or in the alternative, that the Government be compelled to elect between said Counts and other Counts contained in Indictment Nos. 66 CR 254 and 66 CR 255 is hereby denied. U.S. Attorney is directed to prepare and submit draft order on Monday, November 14, 1966 at 10 A.M.—Hoffman, J. (same motion on 66 CR 254.)
11/14/66	Ordered that in Counts 1, 2, 3, 4, and 6 of Indictment 66 CR 254 the defendant Sam Minerva, be severed from the defendant James A. White; and further, that Count 5 of indictment No. 66 CR 254 be dismissed. Further ordered that defendant James A. White's motion for a separate trial on Counts 5 and 6 of Indictment 66 CR 254, or in the alternative, that the Government be compelled to elect between said Counts and other Counts contained in Indictment Nos. 66 CR 254 and 66 CR 255 is hereby denied. —Hoffman, J. (Same motion and draft on 66 CR 254).
11/16/66	Cause called for as to Defendant White. Jury selected and sworn * * * *

Date	Proceedings
11/17/66	Leave to Attorney Stanley Bass to withdraw as associate counsel for defendant with the agreement of the defendant made in open Court. Further evidence heard for the Government. Cause continued to November 18, 1966 at 10 A.M.—Hoffman, J.
11/18/66	Further evidence heard for the Government. Cause continued to November 21, 1966 at 10 A.M.—Hoffman, J.
11/21/66	Further evidence heard for the Government. Government rests. Motion of Defendant to dismiss Count #3 of Indictment 66 CR 254 denied. Motion of Defendant to dismiss Count #4 of Indictment 66 CR 254 denied. Motion of defendant to dismiss all counts of Indictments 66 CR 254 and 66 CR 255 denied. Evidence heard in part for Defendant. Cause continued to November 22, 1966 at 10 A.M. —Hoffman, J.
11/22/66	Further evidence heard for Defendant. Defendant rests. No rebuttal evidence, both sides rest. Defendant's renewed motions unsupported by argument and not restated made or, rather the motions made at the close of the Government's case, denied. Arguments heard. The Court instructs the Jury, alternates discharged, Marshals sworn. Jury retires to consider its verdict or verdicts. (By agreement, jury to sign seal andseparate, polling of jury waived.) (DRAFT) Marshal ordered to furnish supper for twelve (12) jurors and two (2) deputy Marshals. Cause continued to November 23, 1966 at 10:00 A.M.—Hoffman, J.
11/23/66	Defendant fails to appear. Enter order of bond forfeiture as to Defendant White in consolidated cases 66 CR 254 and 66 CR 255 respectively, and Bench warrant to issue. (Ordered Chauncey Eskridge, attorney for Defendant is ordered held in direct contempt of this Court for failure to appear, as aforesaid, and he is fined $100.00 and costs and remanded to the custody of the U.S. Marshal until such fine is paid. (DRAFT)) The Jury returns the following verdicts. In Cause 66 CR 254—"We, the Jury, find the defendant, James A. White, guilty as

Date	Proceedings
11/23/66	charged in the indictment." In cause 66 CR 255, "We, the Jury find the defendant, James A. White, guilty as charged in the Indictment." Judgment on verdicts in Cause 66 CR 254 and 255 respectively. Cause continued to November 30, 1966 at 10:00 A.M. for disposition and/or disposition of motions which may be made or filed. Defendant remanded to the custody of the U.S. Marshal. On motion of respondent Eskridge, order and judgment holding respondent Eskridge in contempt be and is vacated and set aside, etc. Motion of defendant for his enlargement on bail pending disposition set for November 30, 1966, denied. Motion of Defendant to vacate order of bond forfeiture and to recall Bench Warrant denied.—Hoffman, J.
11/23/66	Filed verdict on James A. White of Guilty as charged.
11/29/66	Filed appearance of William R. Ming, Jr., as attorney (additional attorney) for James A. White and affidavit re G R 39.
11/28/66	Filed Motion for judgment of acquittal and/or for new trial.
11/28/66	Filed motion to vacate forfeiture of bail.
11/30/66	Filed information setting forth prior conviction of James A. White.
*	* * * *
11/30/66	Motion of Defendant for judgment of acquittal notwithstanding the verdict denied. Alternate motion for a new trial denied. Leave to the Government to file Information setting forth prior conviction of Defendant White and certified copy of Judgment and commitment 55 CR 51. In cause 66 CR 254, defendant White committed to the custody of the Attorney General for imprisonment for a period of 25 years on each of Counts 1, 2, 3, 4 and 6 of the Indictment and fined $5,000.00 on each of said Counts 1, 2, 3, 4 and 6 and costs of prosecution. Sentences shall run concurrently and fines cumulative. Defendant stands committed until fines and

Date	Proceedings
11/30/66	costs are paid. In cause 66 CR 255, defendant White committed to the custody of the Attorney General for imprisonment for a period of twenty five (25) years on each of Counts 1 and 2 of the Indictment, and fined $5,000.00 on each of said counts 1 and 2, and costs of prosecution. Sentences shall run concurrently and fines cumulative. Defendant stands committed until fines and costs are paid, etc. Sentences this day imposed as to Defendant White in cause 66 CR 255 shall run concurrently with the sentences imposed on said Defendant [illegible]use 66 CR 254. Fines assessed against Defen[illegible]ite in cause 66 CR 255 shall be cumulative [illegible] fines assessed against Defendant in Cause 66 CR 254. Defendant committed to the custody of the U.S. Marshal without bail. Defendant's motion to vacate order of bond forfeiture allowed. Defendant's motion to permit Defendant to be confined in the Cook County Jail for duration of his appeal denied. (2 Drafts)—Hoffman, J.
11/30/66	Filed Certified copy Commitment of James White of May 10, *1955*, in cause No. 55 CR 51.
*	* * * *
12/8/66	Filed Notice of Appeal of defendant White * * *
*	* * * *

INDICTMENT

(Filed Apr. 18, 1966.)

UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

No. 66 CR 254

UNITED STATES OF AMERICA

v.

JAMES A. WHITE AND SAM MINERVA

Vio: Title 26, United States Code, Section 4705 (a), Internal Revenue Code of 1954; Title 21, United States Code, Section 174

The April, 1966 Grand Jury charges:

On or about December 16, 1965, at Chicago, in the Northern District of Illinois, Eastern Division, James A. White and Sam Minerva, defendants, did unlawfully sell, barter, exchange and give away approximately 58.320 grams of heroin, a narcotic drug, to Harvey Jackson not in pursuance of a written order from the said Harvey Jackson on a form issued in blank for that purpose by the Secretary of the Treasury of the United States, or his authorized delegate; in violation of Title 26, United States Code, Section 4705 (a), Internal Revenue Code of 1954.

Count II

The April, 1966 Grand Jury further charges:

On or about December 16, 1965, at Chicago, in the Northern District of Illinois, Eastern Division, James A. White and Sam Minerva, defendants, fraudulently and knowingly did receive, conceal, buy, sell and facilitate the transportation, concealment and sale of approximately 58.320 grams of heroin, a narcotic drug, after it had been imported and brought into the United States contrary to law, knowing that the said narcotic drug had theretofore been imported

and brought into the United States contrary to law; in violation of Title 21, United States Code, Section 174.

Count III

The April, 1966 Grand Jury further charges:

On or about December 29, 1965, at Chicago, in the Northern District of Illinois, Eastern Division, James A. White and Sam Minerva, defendants, did unlawfully sell, barter, exchange and give away approximately 131.976 grams of heroin, a narcotic drug, to Harvey Jackson not in pursuance of a written order from the said Harvey Jackson on a form issued in blank for that purpose by the Secretary of the Treasury of the United States, or his authorized delegate; in violation of Title 26, United States Code, Section 4705 (a), Internal Revenue Code of 1954.

Count IV

The April, 1966 Grand Jury further charges:

On or about December 29, 1965, at Chicago, in the Northern District of Illinois, Eastern Division, James A. White and Sam Minerva, defendants, fraudulently and knowingly did receive, conceal, buy, sell and facilitate the transportation, concealment and sale of approximately 131.976 grams of heroin, a narcotic drug, after it had been imported and brought into the United States contrary to law, knowing that the said narcotic drug had theretofore been imported and brought into the United States contrary to law; in violation of Title 21, United States Code, Section 174.

Count V

The April, 1966 Grand Jury further charges:

On or about January 8, 1966, at Chicago, in the Northern District of Illinois, Eastern Division, Sam Minerva, defendant, did unlawfully sell, barter, exchange and give away approximately 1,119.610 grams of heroin, a narcotic drug, to James A. White not in pursuance of a written order from the said James A. White on a form issued in blank for that purpose by the Secretary of the Treasury of the United States, or his authorized delegate; in violation

of Title 26, United States Code, Section 4705 (a), Internal Revenue Code of 1954.

Count VI

The April, 1966 Grand Jury further charges:

On or about January 8, 1966, at Chicago in the Northern District of Illinois, Eastern Division, James A. White and Sam Minerva, defendants, fraudulently and knowingly did receive, conceal, buy, sell and facilitate the transportation, concealment and sale of approximately 1,119.610 grams of heroin, a narcotic drug, after it had been imported and brought into the United States contrary to law, knowing that the said narcotic drug had theretofore been imported and brought into the United States contrary to law; in violation of Title 21, United States Code, Section 174.

A True Bill, (s) ——, ——, Foreman.

(s) ——, ——, United States Attorney.

JJM:alf

INDICTMENT

(Filed April 18, 1966)

UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

No. 66 CR 255

UNITED STATES OF AMERICA

v.

JAMES A. WHITE

Vio: Title 26, United States Code, Section 4705 (a), Internal Revenue Code of 1954, Title 21, United States Code, Section 174

The April, 1966 Grand Jury charges:

On or about December 9, 1965 at Chicago, in the Northern District of Illinois, Eastern Division, JAMES A. WHITE, defendant, did unlawfully sell, barter, exchange and give away approximately 29.651 grams of heroin, a narcotic drug, to Harvey Jackson not in pursuance of a written order from the said Harvey Jackson on a form issued in blank for that purpose by the Secretary of the Treasury of the United States, or his authorized delegate; in violation of Title 26, United States Code, Section 4705 (a), Internal Revenue Code of 1954.

Count II

The April, 1966 Grand Jury further charges:

On or about December 9, 1965, at Chicago, in the Northern District of Illinois, Eastern Division, JAMES A. WHITE, defendant, fraudulently and knowingly did receive, conceal, buy, sell and facilitate the transportation, concealment and sale of approximately 29.651 grams of heroin, a narcotic drug, after it had been imported and brought into the United States contrary to law, knowing that the said nar-

cotic drug had theretofore been imported and brought into the United States contrary to law; in violation of Title 21, United States Code, Section 174.

A True Bill, (s) ——, ——, Foreman.

(s) ——, ——, United States Attorney.

JJM:alf

• • • • •

IN THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

66 C R 254
66 C R 255

UNITED STATES OF AMERICA, Plaintiff,

vs.

JAMES A. WHITE, Defendant.

Transcript of proceedings had at the trial of the above-entitled cause before the Hon. JULIUS J. HOFFMAN and a jury commencing on the 16th day of November, 1966, at the hour of 10:00 o'clock a.m.

PRESENT:

Hon. EDWARD V. HANRAHAN, United States Attorney, by Mr. J. J. MCDONNELL, Assistant United States Attorney, appeared on behalf of the government;

Mr. CHAUNCEY ESKRIDGE, appeared on behalf of the defendant.

[2-8] * * *

---

[9] * * * CARL L. JACKSON, a witness called by and on behalf of the government, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. McDonnell:

* * * * *

[10] Q. How long have you been so employed as a federal narcotic agent in the Chicago area?

A. Five years.

Q. Calling your attention, sir, to the month of December, 1965, did you have occasion to know and to speak to a man named Harvey Jackson?

A. Yes, I did.

Q. In what capacity did you speak to him, sir?

A. As an agent of the Federal Bureau of Narcotics, and he was working at that time as an informant for the Federal Bureau of Narcotics.

Q. Just to set the record straight, Mr. Jackson, is he any relation by marriage or by blood to you?

A. He is not.

Q. Do you know where Harvey Jackson is today?

A. No, I do not.

Q. When was the last time that you saw the said Harvey Jackson?

A. January 5th of this year.

Q. Have you and other agents of the Federal Bureau of [11] Narcotics attempted to locate Harvey Jackson?

A. We have.

Q. What have you done to locate him, sir? Please tell the ladies and gentlemen of the jury.

A. We have visited his residence at 6141 South Drexel Boulevard. We have visited areas where he was known to hang out. We visited a place where he had worked at one time previously. We checked with Missing Persons, and the FBI has also made endeavors to locate him.

• • • • •

[12] Q. Specifically, Agent Jackson, calling your attention to December 9th at around 6:00 p.m., did you have occasion to be in the offices of the Federal Bureau of Narcotics?

A. Yes, I did.

Q. Were you there alone?

A. No, I wasn't.

Q. Who was with you?

A. Agents Robert J. DeFauw and William C. Kirstann.

Q. What occurred there?

A. We had a conversation.

Q. Pursuant to that conversation, did you have occasion to go somewhere?

A. Yes, I did.

Q. Where did you go?

[13] A. I went with Agents Robert J. DeFauw and William C. Kirstann to 57th and the Outer Drive.

Q. Calling your attention to around 7:00 p.m.—Strike that, please.

What happened when you got to 57th and Lake Shore Drive?

A. We waited there until approximately 7:00 p.m., at which time we were joined by Harvey Jackson who met with us.

Q. What happened when you got to 57th and Lake Shore Drive around 7:00?

A. We were joined there by Harvey Jackson.

Q. What happened when Harvey Jackson came there?

A. When Harvey Jackson arrived, we had a conversation with him, after which he was searched by Agent DeFauw for money and narcotics, he had neither on his person. His automobile was then searched thoroughly for money or narcotics and I found neither in the automobile. Agent DeFauw then placed the radio kel transmitter set on his person, strapped it to him, and we had a further conversation.

[14] Q. Tell the ladies and gentlemen of the jury just what a radio kel set transmitter is, please.

A. It is a small transistorized radio transmitting device which transmits voices or sounds which can be picked up on receiving units from this device.

Q. Have you used such a device before in your professional capacity?

A. Yes, I have.

Q. How many times have you used such device?

A. Many times.

• • • • •

Q. Now what occurred after the kel set was strapped on [15] and the set was tested?

A. Harvey Jackson and I drove to his residence at 6141 Drexel, entered that residence and waited there.

Q. What is located at 6141 South Drexel, if you remember?

A. It is a 2-story frame building that sets back about 40 yards—not 40 yards, about 50 feet from the street.

Q. You same frame. You mean a wooden frame building, is that correct?

A. Yes.

Q. Do you have any idea about what time you arrived there?

A. About 7:45.

Q. Calling your attention to approximately 8:00 p.m. on December 9, 1965, do you know what happened at that time?

A. Yes, I do.

[16] Q. Would you tell the ladies and gentlemen of the jury, please?

A. Harvey Jackson and I were standing in the front room, that is, the living room of his residence when we saw the defendant James White drive up in a black 1962 convertible Cadillac and park in front of the residence. James White left the car and walked to the gateway to the yard of the residence, opened the gate, and then I left the front room and went to the kitchen closet and concealed myself in the kitchen closet.

Q. Would you describe the kitchen closet for us?

A. The kitchen closet is the width of the two doors in the back door at the rear of the court room.

Mr. McDonnell: Let the record indicate approximately six feet, Counsel?

The Court: The witness has given his impression. Evidently counsel isn't interested in joining you in an estimate. They are under no obligation to.

Mr. McDonnell: Yes, sir. May I continue, your Honor?

[17] The Court: You certainly may.

By Mr. McDonnell:

Q. Continue, Agent Jackson, with your description of the closet.

A. There are two doors that open similar to the two doors in the back. They come together, pull out, not in. They pull out together.

Q. They pull out towards the kitchen part, is that correct?

A. That is right.

Q. Now when you say you secreted yourself in the closet, what did you do?

A. After I entered the closet, I cracked the door of the closet where I could observe the area of the kitchen,—that is, more specifically the kitchen table.

Q. What happened after you secreted yourself in the closet?

A. There was a knock on the door. Jimmy White was let inside the apartment.

The Court: Who is Jimmy White?

The Witness: James White, I am sorry, your Honor. James White, the defendant.

By Mr. McDonnell:

[18] Q. Do you see the man that you have been calling Jimmy White and that you have just now referred to as James White? Do you see him in this courtroom?

A. Yes, I do.

Q. Would you point him out?

A. He is seated there at the counsel table between the two counsel.

The Court: Which one.

The Witness: The one in the middle in the brown suit.

Mr. McDonnell: May the record reflect the fact that the witness has pointed out the defendant James White?

The Court: The record may indicate that the witness has identified the defendant in open court.

By Mr. McDonnell:

Q. What transpired then, Agent Jackson?

A. After the knock on the door, Harvey Jackson went to the door, opened the door, and he and James White came through the living room into the kitchen and Harvey Jackson took a seat at the kitchen table.

[19] Q. Was there any conversation?

A. Yes, there was.

Q. Could you overhear that conversation?

A. Yes, I could.

Q. Would you relate it to the ladies and gentlemen of the jury?

A. Yes.

Q. Relate the conversation you overheard as best you can recollect.

Mr. Eskridge: Objection, your Honor.

The Court: Why?

Mr. Eskridge: The witness has testified that one Harvey Jackson he is unable to find. Now this conversation is alleged to have taken place with a third party present. We have no way of telling what the conversation was if

a conversation was had with one Harvey Jackson.

The Court: Except he said the defendant was there. I overrule the objection.

By Mr. McDonnell:

Q. Would you please state the conversation to the best of your memory?

[20] A. Harvey Jackson greeted James White, said "Hello."

Harvey Jackson said, "Come into the kitchen."

They entered the kitchen and Harvey Jackson took a seat. James White stood at the table and then he took from his right jacket pocket a blue wrapped package and laid it on the table. Harvey Jackson asked James White how many ounces were in the package. James White said, "One good ounce."

Harvey Jackson said, "When will I get some more?"

James White said, "Just wait, I'll come by tomorrow and pick the money up first."

Q. Was anything else said at that time?

A. Not to my knowledge, with the exception that James White told Harvey Jackson that he had a few stops to make and that he was going to leave and he would see him tomorrow morning.

Q. Did James White leave then?

A. Yes, he did.

Q. Incidentally, the James White you refer to now, is that the James White you referred to previously as Jimmy White?

[21] A. That is correct.

Q. And that is the defendant?

A. That is correct.

Q. After James White left, what did you do?

A. After James White left, I picked the blue wrapped package up from the table, put it in my pocket and walked to the door where I observed James White go into his car, enter his car, and he drove south on Drexel from my view. I waited there a few minutes with the informant,—that is, I waited with Harvey Jackson a few minutes. We then left the resident, entered his car and drove back to 57th and the Outer Drive where we had met earlier with Agents DeFauw and Kirstann, and at that time I gave that blue

wrapper package that White had put on the table to Agent DeFauw.

* * * * *

[28] Q. Calling your attention specifically to 9:00 a.m. [29] in the morning of December 10, 1965, did you have occasion to go to 57th and Lake Shore Drive?

A. Yes, I did.

Q. Who was there when you got there, if anyone, or did you go there—Strike that.

How did you go there?

A. I drove to that area with Agents Robert J. DeFauw and William C. Kerstann.

Q. What happened when you got there?

A. We met with Harvey Jackson.

Q. After you met with Harvey Jackson, what happened?

A. After we met with Harvey Jackson, we had a conversation after which we drove in Agent DeFauw's automobile—that is, Harvey Jackson, William C. Kerstann and myself, along with Robert J. DeFauw, who was driving the automobile, we drove to 65th Street and the Outer Drive where a public outside telephone was located.

Q. What happened at that location, Agent Jackson?

A. At that location Harvey Jackson made a telephone [30] call which was monitored by me with his permission.

Q. When you say "monitored" would you tell the ladies and gentlemen of the jury what you mean?

A. I listened in on the conversation. I listened with Harvey Jackson from the receiver to a conversation that he had with someone.

Q. Did you see the number that was dialed?

A. Yes, I did.

Q. Will you tell the ladies and gentlemen what number was dialed?

A. Harvey Jackson dialed the telephone number AB4-1130.

Q. Did you on a subsequent occasion check that number and see who the listing was for?

A. Yes, I did.

Q. Do you know who the listing was for at that time?

A. Yes, I do.

Q. Who was it?

A. At that time that telephone number was listed to Francis Thompson, 7500 South Wentworth Avenue, Chicago, Illinois.

[31] Q. Do you know where the defendant James White lived at that time?

A. 7500 South Wentworth.

Q. Have you ever heard the defendant James White's voice before December 10, 1965?

A. Yes, I had.

Q. Have you heard it subsequent to December 10, 1965?

A. Yes, sir.

Q. You say you monitored a phone call on December 10, 1965, around 9:15 or so, is that correct?

A. Yes, sir, that is correct.

Q. Did you recognize the voice on the telephone as you listened in?

Mr. Eskridge: Objection.

The Court: I will overrule the objection.

By the Witness:

A. Yes, I did.

By Mr. McDonnell:

Q. Whose voice was it?

A. It was the voice of——

[32] Mr. Eskridge: Objection, your Honor. The monitoring device is a device which interrupts conversation between two people, and in this case the defendant is identified as being the person on the phone and this is in violation of the law both of Illinois and federal law, and the Federal Constitution.

The Court: I will overrule your objection.

By Mr. McDonnell:

Q. Did you recognize the voice that spoke to you over the phone and to Harvey Jackson over the phone?

A. Yes, I did.

Q. Whose voice was it?

A. It was the voice of the defendant James White.

Q. As best you can recall, please relate the conversation

between Harvey Jackson and the defendant James White.

Mr. Eskridge: I make the same objection, your Honor.

The Court: I will make the same ruling. I overrule your objection.

By the Witness:

A. James White answered the telephone.

[33] Harvey Jackson said, "This is Harvey."

James White said, "This is Jimmy. What is it?"

He said, "I'm leaving the house in a little while and you better come over and get the money now."

At the time James White said, "I'll be over in about an hour to pick up the money."

Harvey Jackson said, "I'll be waiting."

Q. How long did this conversation last, if you remember?

A. Three seconds, three or four seconds.

Q. After that conversation, what, if anything happened?

A. After that conversation we went back to 57th and the Outer Drive where Harvey Jackson was searched for money and narcotics by Agent Robert J. DeFauw and Agent Kerstann in my presence. He didn't find anything.

He then placed the radio kel set transmitter underneath his outer garments. We tested it to see if it was working, after which Harvey Jackson and I entered——

[34] Q. Excuse me. Did you say you tested to see if it was working?

A. Yes.

Q. Was it working?

A. It was working, yes.

Q. All right. What happened after this?

A. After that Harvey Jackson and I entered his automobile and drove to his residence at 6141 South Drexel.

Q. Is that the same place that you previously testified about?

A. It is.

Q. Tell us what happened when you arrived there, sir?

A. We arrived there, I had a cup of coffee, we talked, we had conversation until approximately 10:30 or 10:45.

Q. What happened at 10:45, if you remember?

A. At approximately 10:45 a.m., from the window I observed James White to drive up in a 1964 yellow convertible Thunderbird.

Q. Did you see him after that?

A. Yes. He left the car and started for the gate to the [35] yard of the residence. Then I went back to this kitchen closet that I had concealed myself in previously and concealed myself again.

Q. Is that the same closet you spoke of earlier?

A. It is the same closet, yes.

Q. What did you do with the doors of that closet?

A. I cracked the doors to where I could observe part of the kitchen and the table immediately in front.

Q. When you say cracked the doors, can you fully explain what you mean by that?

A. I opened them part way where I could see without being seen.

Q. Is that a big closet?

A. Yes, it's a pretty good-sized closet. The width is about the size of the doors in back and it goes back, oh, I guess about eight feet from where the doors open, it goes back about eight feet.

Q. Anything in there?

A. Yes, there was some junk in there.

[36] Q. Calling your attention to after you went in this closet, what, if anything, happened that you remember?

A. James White came to the door, knocked on the door. Harvey Jackson let him in. They came in and Harvey Jackson told him to come in the kitchen and take a seat. He entered the kitchen and they took seats at the kitchen table.

Q. Both of them sat down, sir?

A. Yes, they did.

Q. What happened then?

A. After they sat down at the table, Harvey Jackson—James White asked Harvey Jackson if he had the money.

Harvey Jackson said, "Yes."

Harvey Jackson took from his pocket the $1,000 that Agent DeFauw had given him, counted the money out on the table, handed it to James White who in turn counted the money himself and put the money in his pocket.

Q. You saw this, is that correct?

A. Yes, I did.

Q. What happened after this had transpired?

A. After he counted the money, James White told Harvey Jackson—no, Harvey Jackson asked James White when he [37] —he says, "When am I going to get some more stuff?"

James White said, "Saturday night, December 14th." He said, "If there's—" as I recall, he said, "Saturday night, December 14th." I think he said, "If there's any change in plans, I'll give you a call, but if I call you, then you'll know that I mean the original designated time" which was 6:00 p.m.

Q. Did he have occasion to leave then?

A. Yes, he did.

Q. After he left, what happened?

A. After James White left, Harvey Jackson and I waited a few minutes until White was out of view, went to his car and entered, drove back to 57th and the Outer Drive and met with Agents DeFauw and Kerstann.

Q. Were they there when you got there?

A. No, they were not.

Q. How soon after you got there did they arrive?

A. I think about 15 or 20 minutes.

A. What happened when they arrived?

[38] A. When they arrived, Agent DeFauw—we had a conversation, Agent DeFauw, Kerstann and I with the informant? Agent DeFauw then took the radio kel transmitter set from Harvey Jackson's person—that is, he took it from underneath his outer garments, and then we, as I recall, drove to the office of the Bureau of Narcotics.

Q. Now, Agent Jackson, on the occasion that you saw James White the defendant transfer the narcotics or the blue package to the informer Harvey Jackson, did you see Harvey Jackson deliver to the defendant a narcotic written order transfer issued in blank by the Secretary of the Treasury or his delegate?

Mr. Eskridge: Objection.

The Court: Why?

Mr. Eskridge: The question is leading.

The Court: I don't how he can ask it in any other way. I will overrule the objection.

By the Witness:

A. No, I did not.

By Mr. McDonnell:

Q. Did you or anyone in your presence deliver to Harvey [39] Jackson such a blank to give to the defendant James White?

A. No.

Q. Agent Jackson, calling your attention to Saturday, December 11, 1965, at approximately 5:00 p.m., do you know where you were then?

A. Yes, I do.

Q. Where were you, if you remember?

A. As I recall, I was at 59th and Stony Island.

Q. Were you there alone?

A. No, I was not.

Q. Who was there with you?

A. Agents DeFauw and Kerstann.

Q. Anybody else?

A. There were other agents of the office of the Bureau of Narcotics, yes.

Q. Was there anybody else there besides agents of the Bureau of Narcotics and yourself?

A. Harvey Jackson.

Q. What happened at that location at that time?

A. At that location we had a conversation with Harvey Jackson. Agent DeFauw searched him for money and narcotics. He didn't have either.

[40] He then strapped the radio kel transmitter set on his person and we tested to see if it was in working order.

Q. Was it in working order?

A. It was.

Q. What happened then?

A. After that Harvey Jackson and I entered his car and drove to Lake and Wells Street where Harvey Jackson parked on Wells Street between Lake and Wacker on the east side of the street across from a parking establishment.

Q. Calling your attention specifically to about 6:00 p.m. on December 11, 1965, did you have occasion to see the defendant Jimmy—excuse me, James White?

A. Yes, I did.

Q. Tell the ladies and gentlemen of the jury just what happened, please?

A. At about 6:00 p.m. the defendant White came from the west on Lake Street, made a turn, parked in front of a

restaurant on the southwest corner. At that time I signaled for Harvey Jackson to leave his car.

[41] Q. What happened then?

A. Harvey Jackson left his car, started walking about half a block—well, he walked about half a block, but before he could get to the car, James White drove off.

Q. What did you do then?

A. After James White drove off, I went and met with Harvey Jackson. We sat there for a few minutes.

I got out of the car, crossed the street to the parking area, and we waited there for about an hour.

Q. Now calling your attention to approximately 7:00 or 7:15 p.m., did you have occasion to see other members of the Federal Bureau of Narcotics?

A. Yes, I did.

Q. Who did you see?

A. Agents Kerstann, DeFauw, and there were other agents I don't remember.

Q. What happened when you saw them?

A. We had a conversation with Harvey Jackson.

Q. What happened after that conversation, if you remember?

[42] A. After the conversation with Harvey Jackson, we went to the telephone.

Q. Who do you mean by "we"?

A. Agent DeFauw, Harvey Jackson, Kerstann and myself.

Q. What happened at the telephone? Where was the telephone, by the way?

A. As I recall, the telephone was in this drug—I am sorry, it was in the restaurant on the southwest corner that the defendant had parked in front of.

Q. What happened at that location?

A. At that location Harvey Jackson made a telephone call to the defendant's residence.

Q. What did you do?

A. I monitored it.

Mr. Eskridge: Objection. The witness stated that Harvey Jackson made a telephone call to the defendant's residence. There is no way or nothing certainly in this evidence of how this witness knew or that this witness——

The Court: If he didn't do anything, he may state he didn't.

[43] You may answer over objection.

By Mr. McDonnell:

Q. Agent Jackson, you were present when a phone call was made, is that correct, sir?

A. Yes, I was.

Q. Who dialed the number?

A. Harvey Jackson.

Q. What number did you see him dial?

A. AB4-1130.

Q. Is that the same number that was dialed before at 67th and the Outer Drive, sir?

A. That is correct.

Q. Did you hear the voice at the other end of that phone?

A. Yes, I did.

Q. Did you hear the voice at the other end of the phone on December 11, 1965?

A. Yes, I did.

Mr. Eskridge: Pardon me. Do I understand that there was a radio device or some kind of an electronic device attached to a telephone?

The Court: Are you asking me? I am not the witness. [44] If you have any objection, you make your objection. I can't answer your question. I am not the judge of the facts here. I have told the jury that the jury will judge the facts from the evidence. You will be afforded an opportunity to ask questions on cross examination, Mr. Eskridge.

Mr. McDonnell: May I proceed, your Honor?

The Court: You certainly may.

By Mr. McDonnell:

Q. What specifically did you do after he dialed that number?

A. I listened in on the receiver—that is, I put my head close to his where we both could listen in on the receiver and could hear the voice.

Q. Did you recognize the voice on the other end of the receiver?

A. Yes, I did.

Q. Whose voice was it?

A. The defendant James White's.

[45] Q. What was said between Harvey Jackson and the defendant James White?

A. At that time James White answered the telephone and Harvey Jackson said, "This is Harvey."

James White said, "Yes."

Harvey Jackson said, "What happened? I waited down here about two hours on you and I didn't get a chance to meet you."

He said, "Well, I was there and I waited about a few minutes, and I left. You know I don't like to linger around when I got something on me."

Q. Was that the end of the conversation?

A. Harvey Jackson asked James White when he was going to get some more heroin, he said "stuff."

James White said, "Well—"

As I recall, this was when he said, "December 14th."

Q. Now in the business that you are in, Agent Jackson, is the language of the street can you tell the ladies and gentlemen of the jury what "stuff" means?

A. Heroin.

[46] Q. Now you say that the defendant James White said he could get some more stuff on the 14th, is that correct, sir?

A. That is correct.

Q. What happened after he said that?

A. After he said that, he told Harvey Jackson that he would call him.

Q. All right. And then what did you do?

A. That was the extent of the conversation, as I recall. Harvey Jackson hung up the receiver and we left. We left the restaurant and went back to his car. I went with him, Agent DeFauw and Kerstann back to their car and we drove back to the office of the Bureau of Narcotics.

Q. What happened at the Bureau of Narcotics, if you remember?

A. We had conversations with Harvey Jackson.

Q. Do you specifically remember if Harvey Jackson had the kel set at this time?

A. The kel set was taken from his person at that time.

Q. Were you on duty as a Federal Bureau of Narcotic Agent on December 14, 1965?

[47] A. As I recall, I was on another investigation or I might have been on leave. I think I was on another investigation.

Q. Calling your attention to December 16th, were you still on leave or on an investigation?

A. I think I was on leave on the 16th.

Q. Calling your attention to December 28, 1965, at approximately 3:30 p.m., did you have occasion to be in the vicinity of 67th and Stony Island in the City of Chicago?

A. Yes, I did.

Q. Were you alone or were you with someone?

A. I was with Agents Robert J. DeFauw and Raymond L. Vinsik.

Q. What happened there, if you remember?

A. We met with Harvey Jackson.

Q. What occurred when Harvey Jackson came?

A. When Harvey Jackson came, he was searched by Agent DeFauw for money or narcotics, his person was searched. Then his car was searched. I searched his car for money or narcotics and I found neither. Agent Defauw then placed the radio kel transmitter set on his person.

[48] Q. What happened after the kel set was placed on his person?

A. Agent DeFauw gave Harvey Jackson $1200 in official advance funds—$1250, I am sorry.

Q. At that time was the kel set in good working order?

A. It was.

Q. Now after the $1250 was given to the informant Harvey Jackson, what did you do?

A. Harvey Jackson and I entered his car and drove to his residence at 6141 South Drexel.

Q. Calling your attention to approximately 6:00 p.m., what, if anything, happened? That is 6:00 p.m. on December 28, 1965.

A. Harvey Jackson and I were sitting in the front room facing the window. About 6:00 p.m. I observed the defendant White drive up in this black 1962 Cadillac and park his car. He then started for the gateway to the yard of the residence.

Q. What did you do then?

A. I went to this closet and concealed myself.

[49] Q. Was this closet the same closet you have spoken of on two prior occasions?

A. It is.

Q. What happened after you got in the closet?

A. After I got in the closet, there was a few minutes and then there was a knock at the door. Harvey Jackson opened the door and he and James White walked into the kitchen.

Q. Was there a conversation between James White and Harvey Jackson?

A. Yes, there was.

Q. Did you overhear it?

A. Yes, I did.

Q. Will you tell the ladies and gentlemen of the jury and his Honor just exactly what you remember you overheard?

A. Harvey Jackson greeted James White, told him that he had been expecting him and that he was waiting on him.

At that time I think James White said, "It's getting colder. It's a little colder than I thought it would be."

They then entered, they then took seats at the table, and [50] White asked Harvey Jackson if he had the money.

Harvey Jackson said, "Yes, I have $1250."

James White said, "All of it?"

He said, "Yes."

Harvey Jackson counted out the money on the table. After he counted the money out, he handed it to James White who then counted the money. James White put the money in his pocket. At that time Harvey Jackson asked—James White said, "I can't stay around, I got to leave. I got a couple more stops to make."

Harvey Jackson asked James White, he said, "Are you going by Harry B's?"

He said, "No, somebody you don't know."

Q. Was there any further conversation?

A. As I recall, there was not.

Oh, yes, there was some more conversation. James White told Harvey Jackson that he would in the future have to get the money that he was getting from him for the narcotics, he would have to receive it faster because, he said, "The Dago wants the money and I can't be waiting around for it. I got to give the guy his money."

[51] Q. All right. Was that the end of the conversation then?

A. Yes, it was.

Q. What happened after that conversation ended?

A. After that conversation, James White told Harvey

Jackson that he would see him later. He left. I waited around a few minutes and I came out of the closet.

Q. What did you do then?

A. I walked to the door, saw James White get in his car, and he drove off. Harvey Jackson and I waited a few minutes and then we drove back to 67th and Stony Island where we met with Agents DeFauw and——

Q. I am sorry, I didn't hear.

A. We went to 67th and Stony and waited for Agents Vinsik and DeFauw. I don't think they showed up and we drove to the office of the Bureau of Narcotics.

Q. Calling your attention to after the defendant James White left the residence of Harvey Jackson at 641 South Drexel, did you have occasion to search the informant?

[52] A. Yes, I did. I searched his person for money and narcotics. He didn't have either. And I took the kel set from his person.

Q. After you got to the Bureau of Narcotics—after you returned to the Bureau of Narcotics, what, if anything, occurred at that location?

A. We waited there for Agent DeFauw and Agent Vinsik who did come a little time shortly after. After they arrived with other agents of the Federal Bureau of Narcotics, we had a conversation with Harvey Jackson.

Q. You had a conversation?

A. Yes.

Q. Now calling your attention again to your being in the residence of Harvey Jackson at 6141 South Drexel, did you see the defendant James White at that time, or did you see the informant Harvey Jackson at that time deliver to the defendant James White a written narcotic transfer order issued in blank for that purpose by the Secretary of the Treasury or his delegate?

A. No, sir, I did not.

Q. Did you or anyone in your presence deliver to Harvey

[53] Jackson such an order to deliver to James White.

A. No.

Q. Calling your attention to January 5, 1966, Agent Jackson, specifically calling your attention to around 5:00 p.m., do you know where you were at that time on that date?

A. Yes, I was at 67th and Stony Island.

Q. Were you there alone or were you with someone?

A. I was with other agents.

Q. Was there anybody else there?

A. Harvey Jackson, yes.

Q. What happened at that location?

A. Agents Robert J. DeFauw, William C. Kerstann, Harvey Jackson and myself had conversations.

Q. After the conversations were over, what did you see?

A. After the conversations, Agent DeFauw searched Harvey Jackson's person for money and narcotics. He then placed the radio kel transmitter set underneath his outer garments. I searched Harvey Jackson's car for money or narcotics. I found neither. We had further conversations [54] and after that Agent Robert DeFauw gave Harvey Jackson $1300 official advance funds.

Q. Did you have occasion to do something after Harvey Jackson received the official advance funds? Did you have occasion to go somewhere or do something after Harvey Jackson received the $1300?

A. Yes. Harvey Jackson and I entered his car and drove to his residence at 6141 Drexel.

Q. Calling your attention specifically to his residence, do you remember what time you arrived there?

A. About 5:30.

Q. When you got to his residence, what did you do?

A. We waited there until about 6:00 p.m., as I recall.

Q. Calling your attention specifically to between the hours of 6:00 and 6:20 p.m., what, if anything, occurred that you remember?

A. At that time James White drove up in this same black 1962 convertible Cadillac. It is a white top with a black bottom. He parked the car——

[55] Q. Excuse me. Is that the same car you have been referring to previously?

A. Yes, but I had not mentioned the white top.

He parked the car, left the car and started—that is, he started toward the gate to the entrance to the yard of the residence.

Q. What did you do then?

A. I went to this same closet and concealed myself after he had entered the date.

Q. What happened then?

A. After I entered the closet, I heard a knock on the door. Then I heard Harvey Jackson invite the defendant inside

the house. Inside the house Harvey Jackson told James White to come into the kitchen and have a seat. They entered the kitchen, took seats at the table, and at that time James White asked Harvey Jackson if he had the other money. Harvey Jackson said, "Yes, I got $1300." He counted out $1300 that he took from his pocket, counted the money out, put it on the table. James White picked the money up, he counted it, and told Harvey Jackson that [56] he had counted it too fast. After James White counted the money, he told Harvey Jackson that he now owed him $950 and that he wanted that as soon as possible. Harvey Jackson said, "When do you want it?"

James White said, "Come by the restaurant and I'll get it."

Q. Was there any further conversation that you remember, sir?

A. Yes, there was. Harvey Jackson asked James White when could he expect more heroin?

James White said, "Probably after I get back from out of town." He said, "I'm leaving town, I won't be back until after the 8th," and he says "You'll need some because there's going to be a panic."

Harvey Jackson said, "There is?"

He said, "Yes." He said, "You better hurry up and get it to me then."

As I recall, he then told Harvey Jackson that he had some more people to see, he mentioned that he had to see Harry B. and his brother, and then there were a couple of other people he had to see, and he then told Harvey Jackson [57] to come by the club with the rest of the money and they would talk about getting the stuff.

Q. Was this the end of the conversation?

A. Yes, that was the end of the conversation.

Q. Did you see what happened then?

A. James White left.

Q. What hapened after White left?

A. After White left, Harvey Jackson and I waited a few minutes in his residence. While we were waiting, I took the kel set from his person, put it in my pocket. I searched him. We then drove in his car back to 67th and Stony Island where we met with the agents that we had met with earlier, Agents Kerstann, DeFauw, and there were other

agents from our office, and all of us then drove to the office of the Bureau of Narcotics where we had conversations with Harvey Jackson and the other agents.

• • • • •

[61] Cross-examination.

By Mr. Eskridge:

Q. Mr. Jackson, you spoke of an informant by the name of Harvey Jackson. Now you testified that you last saw him in January of 1966?

A. To the best of my knowledge that's the last time I saw him, yes.

Q. Now have you been to his home since that time?

A. Yes, I have.

Q. Does he still live there?

A. No, he doesn't.

Q. Did you make an effort to find out where he moved to?

A. Yes, our office has made efforts to locate him.

Q. Did you make an effort?

A. Yes, I have made efforts.

Q. What did you do in the efforts that you made to locate this Harvey Jackson?

[62] A. I talked with his wife. She stated she didn't know where he was. I visited a couple of places that she said he frequented, a couple of taverns not too far from there. I checked with the Light Company. We checked with Missing Persons of the Police Department. Also the FBI made endeavors to locate Jackson.

Q. How long ago was it that you went to his home?

A. Around July or August.

Q. And you talked to his wife?

A. Yes.

Q. What kind of work did he do?

Mr. McDonnell: Objection, your Honor.

The Court: I sustain the objection.

By Mr. Eskridge:

Q. Did you know where he worked?

Mr. McDonnell: Objection.

The Court: I will sustain the objection.

By Mr. Eskridge:

Q. Besides going to his home and talking to his wife, did you go anywhere else to look for him besides the taverns?
[63] A. We checked with Missing Persons at the Police Department.

Q. Did you go any other place?

A. No.

Q. Just the taverns and his home?

A. The taverns, his home and the FBI made some endeavors, and we checked with Missing Persons of the Police Department.

* * * * *

[64] Q. When you got to Harvey Jackson's home, do I understand that Harvey Jackson permitted you to enter his home?

A. I went with him. He opened the door and I went in with him.

Q. When you went in with him, did he give you permission to move into his closet, or did you ask him?
[65] A. Yes, he had given me permission. He had mentioned that there was a closet and that he usually did business with James White in the kitchen.

* * * * *

---

[107] ROBERT J. DEFAUW, a witness called by and on behalf of the government, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. McDonnell:

* * * * *

Q. Now calling your attention, Agent DeFauw, to Decem-
[108] ber 9, 1965, around 7:00 p.m. that evening, do you know where you were?

A. Yes. I was at 57th and the Lake Shore Drive, Chicago, Illinois.

Q. Were you there alone?

A. No. I was in the company of Agent Jackson and Agent Kerstann.

Q. Did you have occasion to meet someone there?

A. Yes. I met Harvey Jackson at that location.

Q. After Harvey Jackson came, what happened, if anything?

A. We had a conversation.

[109] Q. Pursuant to that conversation did you do anything?

A. Yes. I searched Harvey Jackson, found neither narcotics nor money on his person. Subsequent to the search I placed a kel set transmitter under Jackson's outer clothing.

Q. What is a kel set transmitter?

A. It is a radio transmitter which is capable of transmitting voices and sounds which we are able to receive over our car radio.

Q. How far can these voices and sounds be transmitted?

A. That depends a lot on the area in which you are in in the city. We have received communication up to a mile.

Q. Calling your attention to this evening around 7:15 p.m., did you have occasion after you strapped the kel set transmitter onto Harvey Jackson, did you have occasion to do something?

A. I had Jackson speak at various ranges from our vehicle and I was able to hear his voice over our receiver.

Q. Was the Kel set in good working operation?

[110] A. Yes, it was.

Q. What happened then, Agent DeFauw?

A. Agent Jackson and Harvey Jackson then entered Harvey Jackson's vehicle and I followed them to 6141 South Drexel, the residence of Harvey Jackson.

Q. On the way there did you have occasion to do anything concerning the kel set transmitter?

A. Yes. Agent Jackson spoke to Harvey Jackson. I blinked my headlights to show them I was receiving their transmissions.

Q. After you got to 6141 South Drexel—

By the way—Strike that, Miss Reporter.

What is in the vicinity of 6141 South Drexel?

A. Directly across the street from the informant's residence is a convalescent home.

Q. How big is that?

A. It is quite a large building, it almost takes up the entire block.

Q. Now after you arrived at 6141 South Drexel, what did you do?

[111] A. I instituted surveillance of 6141 South Drexel, the residence of Harvey Jackson.

Q. Were you there alone or were you there with someone?

A. I was with Agent Kerstann.

Q. Calling your attention to around 8:00 p.m., did you have occasion to see someone that you know?

A. Yes, I did.

Q. Who did you see?

A. I observed James A. White park a 1962 Cadillac convertible in front of 6141 South Drexel and enter that address.

Q. Could you describe the Cadillac convertible?

A. It is a black convertible with a white top and it has 1965 Illinois license No. LA 2621.

Q. Do you see the same person in court today that you saw on that occasion?

A. Yes, sir, I do.

Q. Would you point him out, please?

A. He is seated behind counsel wearing a brownish-colored suit.

Q. Is that the man that you know as James A. White?

[112] A. Yes, it is.

Mr. McDonnell: Would the record reflect the fact that the agent has pointed out the defendant James A. White?

The Court: The record may indicate that this witness has identified the defendant White in open court.

By Mr. McDonnell:

Q. Now after Mr. White pulled up in his Cadillac, what, if anything, happened?

A. I observed him park the vehicle in front of 6141 South Drexel and enter that residence.

Q. Did you have occasion to do anything then?

A. I heard Harvey Jackson say, "Hello, Jimmy. Come on in and sit in the kitchen away from the children."

* * * * *

[115] Q. I now show you what has been marked as Government's Exhibit Z and ask you if that refreshes your recollection.

The Court: That is Z for identification.

Mr. McDonnell: Yes, sir.

By the Witness:

A. Yes, it does. This is a memorandum report which I prepared on December 14, 1965, and my signature appears at the bottom of the first page.

By Mr. McDonnell:

Q. Does that refresh your recollection?

A. Yes, it does.

Q. Would you tell us now what the conversation was between the defendant James A. White and the informer Harvey Jackson without reading therefrom?

Mr. Eskridge: Objection. He is reading from something——

The Court: He hasn't started to read yet. The question was put to him with a direction to the witness not to read. [116] He may answer over the objection.

By the Witness:

A. Generally the informant stated, "Hello, Jimmy. Come on in. Sit in the kitchen away from the children."

Then I heard White's voice stated, "I've got the package for you" and I heard Harvey Jackson state——

Mr. Eskridge: I am sorry, your Honor, I still can't hear him.

The Court: Try shouting at Mr. Eskridge. The lawyer can't hear you.

The Witness: Can you hear me now, Mr. Eskridge?

I then heard the informant say, "How much is in the package?"

I heard White's voice state, "There's a pretty good ounce in there."

Then I heard the informant state, "You know I don't have the money yet."

And I heard White's voice state, "I'll be back tomorrow morning to pick it up."

And the informant said, "All right. I'll see you then." [117] I heard the defendant White say, "I've a couple of stops to make."

And that was the end of the conversation as I remember it.

By Mr. McDonnell:

Q. Subsequent to the conversation, what, if anything, did you see?

A. I saw James White leave 6141 South Drexel and enter his vehicle.

Q. What, if anything, did you do then?

A. I followed White to 7500 South Wentworth Street where I observed him park his car and enter a dwelling located at that address.

Q. Would you describe that dwelling, if you can?

A. It is a brick, one-family home. I would say it is a fairly nice-looking home, it is quite expensive, I would say.

Q. Now at that location what did you do?

A. I continued surveillance of White's residence for approximately 45 minutes and then the surveillance was discontinued.

Q. What did you do then?

[118] A. I returned to 57th and Lake Shore Drive where I met with Agent Jackson and Harvey Jackson.

Q. What occurred at that location?

A. Agent Jackson handed me a blue paper package which I examined.

Q. Will you tell the ladies and gentlemen of the jury what your examination consisted of?

A. I found the blue paper to contain a piece of aluminum foil which further contained a plastic bag which contained a quantity of white powder.

Q. Would you tell the ladies and gentlemen what you did then?

A. I performed a field test with a marquis reagent on a small portion of the white powder contained in the plastic bag in the presence of Agent Jackson and Agent Kerstann, and I observed a positive reaction.

Q. Tell the ladies and gentlemen what a positive reaction on a field test is.

A. A marquis is an acetic solution, and if one places an opiate into this solution, the solution turns a purplish color.

Q. What happened on that occasion?

[119] A. The solution turned a purplish color.

Q. What did you do then?

A. I then retained custody of the evidence. Then I searched Harvey Jackson and I found neither narcotics nor money on his person. Subsequent to the search I removed the kel set transmitter from Jackson.

Q. What happened after you removed the kel set transmitter?

A. Agent Jackson, Agent Kerstann and Harvey Jackson and I then returned to the offices of the Bureau of Narcotics.

* * * * *

[121] Q. After the kel set was placed on Harvey Jackson, did you have occasion to do something concerning it?

A. Yes. I furnished Harvey Jackson with $1,000 of previously-recorded official advance funds.

Q. With regard to the kel set, did you have occasion to do something concerning the kel set, sir?

A. We tested the kel set transmitter and found it to be in working order.

Q. Subsequent to your giving Harvey Jackson the $1,000—

Incidentally, where did you get the $1,000?

A. From the office of the Bureau of Narcotics at Chicago, Illinois.

Q. After you gave Harvey Jackson the $1,000, what, if anything, did you do?

A. Agent Jackson then entered Harvey Jackson's vehicle and they drove to 6141 South Drexel. I followed them to that location.

[122] Q. Calling your attention to approximately 10:45 a.m. on December 10, 1965 did you have occasion to see someone that you know?

A. Yes, sir, I saw James A. White.

Q. Is that the defendant?

A. The defendant James A. White park a 1964 Thunderbird convertible in front of 6141 South Drexel. The thunderbird convertible at that time had a 1965 Illinois license plate on it FG 8688.

Q. Are you sure of the license number of that automobile?

A. I may be mistaken.

Q. Have you reviewed your file on the license number at all, Agent DeFauw?

A. Yes, I have reviewed my file, but I may be mistaken on the plate number.

Q. Did you write down the license number?

A. Yes.

Q. Subsequent to that did you have occasion to find out who the license plate on that automobile was listed as belonging to?

A. The vehicle was registered to a Frances White at 7500 South Wentworth.

Q. Do you know who Frances White is, sir?

[123] A. I believe she is the wife of the defendant James A. White.

Q. Calling your attention to that date, December 10, 1965, at approximately 10:45 a.m., did you have occasion to see where the defendant James A. White proceeded after he left the automobile?

A. I observed the defendant White enter 6141 South Drexel.

Q. Whose home is that, if you know?

A. The residence of Harvey Jackson.

Q. What occurred after that?

A. After that I heard a conversation between Harvey Jackson and James White.

Q. Can you state fully from your memory with exactness that conversation?

A. I can state merely——

Mr. Eskridge: Objection. This was a conversation over a radio and the objection was made before, your Honor, that the radio communication was in violation of the statute.

The Court: I overrule the objection.

• • • • •

[124] • • •

A. No, I cannot.

• • • • •

Q. Is there anything that will refresh your recollection?

A. Yes, the report which covers that particular event.

Q. I now show you what has previously been marked as Government's Exhibit Z for identification. I ask you to look at it and I ask you if that will refresh your recollection?

A. Yes, it will.

Q. Are you finished?

A. Yes, I am.

Q. Would you state now the conversation that you heard on December 10, 1965, at 6141 South Drexel?

A. As I observed James A. White enter 6141 South Drexel, I heard his voice say, "Hi. Have you got the money?"

And I heard Harvey Jackson say, "Yes, I've got the grand."

[125] Q. Could you identify the voices?

A. Yes.

Q. Continue, please.

A. I then heard Harvey Jackson mumbling some numbers. Then I heard Harvey Jackson say, "Here, you count it to make sure it's right."

I then heard the defendant White's voice mumbling some numbers and I heard him say, "Yes, it's all here."

I then heard White say, "I'll have another one for you Saturday." He said, "I'd like you to meet me at six o'clock at Lake and Wells Street, but if there's any change, I'll call you on the phone, and if I tell you to meet me at four, that means to meet me at six, because you never know when the telephone is funny."

So the informant agreed to that, and that terminated the conversation to the best of my knowledge..

Q. Subsequent to the termination of this conversation, Agent DeFauw, did you have occasion to see the defendant James White again?

A. Yes, I did.

[126] Q. Where did you see him?

A. I observed him leave Harvey Jackson's residence, enter the Thunderbird convertible, and I followed him back to 7500 South Wentworth Street where I observed him park the car and enter his residence.

Q. Did you stay in that vicinity?

A. For a short period of time.

Q. Did you have occasion to go somewhere else after that?

A. Yes. Agent Kerstann and I then returned to 57th and Lake Shore Drive where I met with Agent Jackson and Harvey Jackson.

Q. What happened at 57th and Lake Shore Drive?

A. We had a conversation.

Q. In pursuance of that conversation, did you have occasion to do anything?

A. Yes, I searched Harvey Jackson and found neither narcotics nor money on his person. I then removed the kel set transmitter from Harvey Jackson.

• • • • •

[133] Q. Agent DeFauw, calling your attention to December 11, 1965, at approximately 5:00 p.m., do you have any idea where you were at that time on that date?

A. Yes. I met with Harvey Jackson, Agent Jackson and Agent Kerstann at 59th and Stony Island Streets.

Q. What occurred at that location?

A. We had a conversation.

Q. Pursuant to that conversation did you do something?

A. Yes. I searched Harvey Jackson, found neither narcotics nor money on his person, I then placed the kel set transmitter under his outer clothing and tested the transmitter to make sure it was working.

Q. Was it working, sir?

A. Yes, it was.

[134] Q. What happened then?

A. Agent Jackson searched Harvey Jackson's vehicle. Then Agent Jackson and Harvey Jackson drove to the vicinity of Wells and Lake and I followed them to that location.

Q. What happened in that vicinity?

A. I observed Harvey Jackson park his personal vehicle about mid-block between Lake and Wacker Drive on the east side of Wells Street.

Q. And in what position would his car be facing?

A. His vehicle was going north.

Q. What did you do?

A. I instituted surveillance in the vicinity of Lake and Wells Streets.

Q. Calling your attention to approximately 6:00 p.m., did you have occasion on that date to see anyone that you know?

A. Yes. I observed the defendant James A. White park his 1962 black Cadillac convertible bearing license No. LA 2621 on the west side of Wells Street just south of Lake.

Q. Now what position would his car be facing?

[135] A. His car was facing south.

Q. What happened at that time?

A. I observed the defendant White remain at that location for a very short period of time and then he drove off south on Wells Street out of view.

Q. Did you see anybody else in that area that you know?

A. I observed Harvey Jackson walking south on Wells Street to the place where the defendant White had parked his car.

Q. Did they meet?

A. No, they did not.

Q. After the defendant James A. White drove off in his Cadillac, what did you do?

A. I met with Agent Jackson, Harvey Jackson and Agent Kerstann and we had a conference.

Q. Calling your attention to around 7:00 or 7:15 p.m., what, if anything, occurred?

A. We entered a restaurant which is located on the west side of Wells Street south of Lake Street, I believe it is called Pixley Ehlers' restaurant.

Q. What occurred in that restaurant, sir?

[136] A. Agent Jackson and Harvey Jackson went to the public telephone. I observed Harvey Jackson dial telephone number AB 4-1130 and I observed Agent Jackson place his ear close to the receiver while Harvey Jackson spoke.

Q. Could you hear the conversation?

A. No, I could not.

Q. Subsequent to that conversation, did you have occasion to go to Columbus Drive in the City of Chicago?

A. Yes. Subsequent to the conversation, Agent Jackson, Agent Kerstann, Harvey Jackson and I proceeded to Columbus Drive just north of Congress where we had a conference.

Q. What happened there?

A. I searched Harvey Jackson, found neither narcotics nor money on his person, and I then removed the kel set transmitter which I had previously placed on him.

Q. What did you do then?

A. We returned to the offices of the Bureau of Narcotics where we had a conference.

[138] Q. Now calling your attention, Agent DeFauw, to December 14, 1965, and specifically to the hour of 7:00 p.m. that evening, did you have occasion to be in the vicinity of 59th and Stony Island Avenue in the City of Chicago?

A. Yes, I did.

Q. Were you there alone?

A. I was with Agent Kerstann and Harvey Jackson.

Q. What happened at that time and place?

A. I searched Harvey Jackson, found neither money nor narcotics on his person. Agent Kerstann searched Harvey Jackson's vehicle and found neither money nor narcotics in the vehicle.

I then placed the kel set transmitter on Harvey Jackson under his outer clothing, tested the transmitter and found it to be in working order.

Q. What happened after you tested the kel set?

[139] A. I furnished Harvey Jackson with $360 of previously-recorded official advance funds.

Q. What happened then?

A. Harvey Jackson entered his vehicle and I followed him to 7500 South Wentworth.

Q. What did you see at that location, if anything?

A. I observed him park his car and enter the residence at 7500 South Wentworth.

Q. Do you know who lives there? Strike that.

Did you know who lived there on December 14, 1965?

A. Yes, I did.

Q. Who lived there then?

A. James A. White.

Q. After Harvey Jackson entered the residence at 7500 South Wentworth, did you have occasion to do something or hear something?

A. Yes. I received voices over the radio in my vehicle.

Q. Did you recognize any of the voices that you heard?

A. Yes, I did.

[140] Q. Whose voices were they?

A. The voices of the defendant James A. White and Harvey Jackson.

Q. Can you recall specifically what the conversation between Harvey Jackson and the defendant James White was on December 14, 1965, at 7500 South Wentworth Avenue?

A. No, I cannot.

Q. Is there anything that will refresh your recollection?

A. Yes, the report governing the event which took place on that date.

Mr. McDonnell: Mark this as Government's Exhibit Y for identification.

• • • • •

By Mr. McDonnell:

Q. I now show you what has been marked as Government's Exhibit Y for identification and I ask you if this is the report to which you testified?

A. Yes, this is the report which states the event which took place on December 14, 1965.

[141] Q. Specifically calling your attention to paragraphs 3 and 4, do you recognize those paragraphs?

A. Yes, I do.

Q. Does this refresh your recollection as to the conversation between the defendant Harvey Jackson, the informant, and the defendant James A. White on December 14, 1965, at 7500 South Wentworth Avenue?

A. Yes, it does.

Q. Would you read it, please, and refresh your recollection?

Are you finished, sir?

A. Yes.

Q. Has your memory been refreshed?

A. Yes, it has.

Q. Will you please tell the ladies and gentlemen of the jury the conversation that you overheard between the defendant James A. White and the informant, Harvey Jackson?

A. I heard James A. White state, "Do you have $360?"

I heard Harvey Jackson's voice reply, "Here it is, here's the $360. You count it."

[142] Q. Did you recognize these voices?

A. Yes, I did.

Q. They were the voices of whom?

A. They were the voices of the defendant James A. White and Harvey Jackson.

Q. Please continue, Agent DeFauw.

A. I then heard the defendant White mumble some numbers, and after that I heard him say that he'd give Harvey

Jackson another two ounces on Thursday, December 16, 1965, and he stated he wanted $1250 for two ounces and he wanted the money within a week and a half after he delivered the merchandise.

I also heard the defendant White state that he wanted Harvey Jackson to move the stuff faster and he stated that the Dagoes wanted their money sooner than what they had been getting it.

That's all I recall of the conversation.

Q. Is your memory exhausted as to the conversation now?

A. Yes, it is.

Q. Is there anything that will refresh your memory?

[143] A. Yes, the report.

Q. I again show you the report to which you referred, Government's Exhibit Y for identification, and I ask you to refresh your recollection.

Is your recollection refreshed?

A. Yes, it is.

Q. Would you please state the rest of the conversation?

A. The informant then inquired as to the quality of the stuff which he was to receive and I heard White reply that "The stuff is so good that after you cut it twice, it'll jump out of your man's hand on the street."

Q. What happened then?

A. I then heard the defendant White instruct Harvey Jackson that he should meet him on Thursday, December 16th, at 6:00 p.m. sharp in front of Hyman's Men's Clothing Store, which is located on the east side of Clark Street just south of Wacker Drive.

Q. Was that the extent of the conversation that you remember now?

[144] A. He instructed the informant not to be late like he was the previous Saturday.

Q. What happened then?

A. I then observed Harvey Jackson leave 7500 South Wentworth and enter his vehicle.

Q. Calling your attention to the vicinity of 76th and Wentworth on December 14, 1965, did you have occasion to see somebody that you knew?

A. Yes, I did.

Q. Who did you see?

A. I was with Agent Kerstann and I saw Harvey Jackson at that location.

Q. What happened at that location?

A. We had a conference.

Q. What happened after the conference?

A. I searched the informant and found neither money nor narcotics on his person. I then removed the kel set transmitter from the informant's person.

Q. What did you do then?

A. Agent Kerstann, Harvey Jackson and I then returned to the offices of the Bureau of Narcotics where we had a conference.

[145] Q. Calling your attention to approximately 5:30 p.m. on December 16, 1965, did you have occasion to be in the vicinity of 59th and Stony Island?

A. Yes, I was in that vicinity.

Q. Were you alone?

A. I was with Agent Kerstann.

Q. Did you have occasion to see anybody that you knew?

A. I spoke with Harvey Jackson also at that location.

Q. What happened after you spoke with Harvey Jackson?

A. I searched Harvey Jackson, found neither money nor narcotics on his person. I then placed the kel set transmitter on Harvey Jackson under his outer clothing. I tested the transmitter to make sure that it was in working order, and it was, and I observed Agent Kerstann search Harvey Jackson's vehicle, and he found neither narcotics nor money in the vehicle.

Q. Afetr the search of Harvey Jackson and Harvey Jackson's vehicle, did you have occasion to go somewhere at that time?

A. Yes, I did.

Q. Where did you go?

[146] A. I followed Harvey Jackson as he drove to a parking lot which is located on the southeast corner of Clark and Wacker Drive.

Q. What happened then at that location?

A. He parked his vehicle in that parking lot and then walked to the front of the Hyman's Men's Clothing Store which is located approximately mid-block between Wacker Drive and Lake Street on the east side of Clark Street.

Q. Calling your attention to approximately 6:00 p.m. that evening, did you have occasion to see anybody that you knew?

A. Yes, I observed James A. White meet with Harvey Jackson in front of Hyman's Men's Clothing Store.

Q. Is that the defendant James A. White?

A. Yes, it is.

Q. What did you see then, if anything?

A. Jackson and the defendant White then walked to Jackson's car, entered the car and drove out of the parking lot.

Q. Did you have occasion to see anybody else in that area that you recognized?

[147] A. Yes, there were many agents in the area at that time.

Q. Now after you saw the defendant James White and the Federal Bureau of Narcotics informant Harvey Jackson drive off in Jackson's car, what did you do?

A. I followed the two subjects in Harvey Jackson's car.

• • • • •

Q. What, if anything, transpired during this following procedure?

A. They drove in the vicinity of the Loop area and the near north side for approximately two hours. During that period of time I heard conversations between the defendant White and Harvey Jackson as they were received over the 2-way radio.

[148] Q. Would you tell the ladies and gentlemen of the jury what that conversation was to the best of your memory?

A. To the best of my memory, the conversation was strictly about stuff and the price of stuff and quality of heroin.

• • • • •

[149] Q. Is your memory exhausted as to the conversation between White and the informant on that evening?

A. Yes, it is.

Q. Is there anything that will refresh your recollection?

A. The report which governs the events which took place on that date.

Q. I now show you what has been previously marked as Government's Exhibit Y for identification and ask you to look at it to see if it will refresh your recollection.

Are you finished with that report?

A. Yes, I am.

Q. Does it refresh your recollection?

A. Yes, it does.

Q. Will you please tell the ladies and gentlemen of the jury and his Honor what the conversation was to the best of your recollection?

A. After having a general conversation about heroin and the quality of heroin, I heard White say, "I have to meet my man right on time because he won't wait."

Q. What happened then?

[150] A. I then observed him stop Harvey Jackson's vehicle at Franklin and Wells Streets where I observed Harvey Jackson leave the car. I observed the defendant James A. White then drive the informant's vehicle. He proceeded to State and Randolph Streets where I observed an unidentified white male enter Harvey Jackson's car with the defendant White.

Q. Did you continue to follow the car?

A. Yes, I did.

Q. What happened then after the male entered the car?

A. They drove west on Randolph Street to approximately half a block west of State Street where I observed the white male leave the car.

A. What did you do then?

A. I followed the white male.

Q. Now calling your attention to 9:00 p.m. that evening, did you have occasion to be on the south side of Chicago? Excuse me. Calling your attention to 9:00 p.m. that evening, did you have occasion to be in the vicinity of Columbus Drive and Congress Streets?

[151] A. Yes, I did.

Q. Were you there alone?

A. I met with Agent Kerstann and Harvey Jackson at that location.

Q. What occurred there?

A. Harvey Jackson handed me a brown paper bag which I examined and found to contain a white paper bag which further contained a plastic bag which contained a quantity of white powder.

Q. What did you do then?

A. I performed a field test on a small portion of the white powder contained in the plastic bag with a marquis reagent in the presence of Agent Kerstann, and I observed a positive reaction indicating the presence of an opiate.

Q. What happened after you performed this field test?

A. I retained custody of the evidence.

Q. After that what occurred, if anything?

A. I then searched Harvey Jackson and found neither narcotics nor money on his person. I then removed the kel set transmitter which I had previously placed on his person and I conferred with the subject.

[152] Q. After that conversation did you have occasion to go somewhere?

A. After my conversation with Harvey Jackson, I observed Agent Kerstann search Harvey Jackson's vehicle, and he found neither narcotics nor money in the vehicle.

Q. What happened after that?

A. Harvey Jackson, Agent Kerstann and I then proceeded to the offices of the Bureau of Narcotics where I tested, weighed and sealed the evidence, placed the evidence in a lock-seal type evidence envelope which I placed in my personal locker for safekeeping pending delivery to the United States chemist.

• • • • •

[168] Q. Calling your attention to December 28, 1965, at approximately 3:30 p.m., did you have occasion to be in the vicinity of 67th and Stony Island Avenue here in Chicago?

A. Yes, I did.

Q. Were you alone?

A. I was in the company of Agent Vinsik and Agent Jackson and Harvey Jackson.

Q. What happened at that location at that time?

A. We had a conference and subsequent to the conference I searched Harvey Jackson. I found neither money nor narcotics on his person.

[169] I then placed the kel set transmitter beneath his outer clothing, tested the transmitter to make sure it was functioning properly.

Q. Was it functioning properly?

A. Yes, it was.

Q. And what happened then?

A. Agent Jackson and Harvey Jackson then entered Harvey Jackson's vehicle and drove to 6141 South Drexel Street where I observed Harvey Jackson park his car and I observed both Agent Jackson and Harvey Jackson enter Harvey Jackson's residence.

Q. Before Harvey Jackson and Agent Jackson left the vicinity of 67th and Stony Island, did you have occasion to do anything with the person of Harvey Jackson?

A. I furnished Harvey Jackson with $1250 of previously-recorded official advance funds.

Q. Now calling your attention to the location outside of Harvey Jackson's home at 6141 South Drexel, what specifically did you do when you arrived there, sir?

A. I instituted surveillance at that location.

[170] Q. Calling your attention specifically to approximately 6:00 p.m. on the evening of December 28, 1965, did you have occasion to see somebody that you know?

A. Yes, I observed the defendant James A. White park his 1962 black Cadillac convertible in front of Harvey Jackson's residence. He left his vehicle and entered 6141 South Drexel.

Q. After he entered 6141 South Drexel, did you have occasion to hear or do something?

A. Yes, I heard the defendant James A. White and Harvey Jackson. I heard the defendant White ask Harvey Jackson if he had the $1300.

Q. You heard voices, is that correct?

A. Yes.

Q. Did you recognize those voices at that time?

A. Yes, I did.

Q. Whose voices were they?

A. They were the voices of the defendant James A. White and Harvey Jackson.

Q. Did you overhear their conversation?

A. Yes, I did.

Q. Would you please relate to the ladies and gentlemen of the jury and to his Honor, Judge Hoffman, the text of [171] the conversation as best you can?

A. As I recall, the defendant James White asked Jackson if he had the money.

Jackson told him he had the money.

Then I heard the informant mumbling some numbers, and then I heard the defendant White state, "You count too fast, man. Give me the money, I'll count it."

So then I heard the defendant White count $1250.

Q. Was that the extent of the conversation, Agent DeFauw??

A. That is as much as I can recall at this time with any accuracy.

Q. Is your memory exhausted as to that conversation?

A. Yes, it is.

Q. What will refresh your memory?

A. The report which covers the event which took place on that date.

Mr. McDonnell: Mark this as Government's Exhibit X for identification.

• • • • •

[172] By Mr. McDonnell:

Q. I show you what has been previously marked as Government's Exhibit X for identification and I will ask you to read it to determine whether that will refresh your recollection.

Have you finished?

A. Yes.

Q. Does that refresh your recollection?

A. Yes, it does.

Q. Would you tell his Honor and the ladies and gentlemen of the jury the text of the conversation?

A. After I heard the defendant White count the money, I heard the informant ask when he would be able to obtain some more stuff.

White said, "I'll be able to get some more for you tomorrow." He stated that Jackson would have to get the money faster because the Dago is insisting on fast delivery of the money. So then I heard the defendant White state that he had to leave, he had another stop to make and that terminated the conversation.

[173] Q. After the termination of the conversation, what happened, if you recall?

A. I observed the defendant White leave 6141 South Drexel, enter his Cadillac, and I followed him to the vicinity of 63rd and Cottage Grove Streets where I lost him in traffic.

Q. What did you do then?

A. I returned to 67th and Stony Island where I met with Agent Jackson, Agent Kerstann and Harvey Jackson.

Q. What happened then, if you recall?

A. We had a conference.

Q. What happened after the conference was ended?

A. We returned to the offices of the Bureau of Narcotics where we had another conference.

Q. Calling your attention to December 29, 1965, at approximately 5:00 p.m., did you have occasion to be in the vicinity of Columbus Drive and Congress in the City of Chicago?

A. Yes, I did.

Q. Were you there alone?

A. I was with Agent Kerstann and Harvey Jackson.

[174] Q. What happened at that time at that location?

A. At that location Harvey Jackson and I had a conference. Subsequent to the conference I searched Harvey Jackson and I found neither money nor narcotics on his person.

I then placed the kel set transmitter beneath his outer clothing, tested it to make sure it was functioning properly.

Q. Was it functioning properly?

A. Yes, sir, it was.

Q. What happened after you tested it?

A. I observed Agent Meyer search Harvey Jackson's automobile. He found neither money nor narcotics in it.

Q. What happened after Agent Meyer searched Jackson's auto?

A. Agent Meyer and I followed Harvey Jackson as he drove to the parking lot which is located on the southeast corner of Clark at Wacker Drive.

Q. What happened at that location, if you remember?

[175] A. I observed Agent Connolly in the vicinity. Then Agent Meyer and I proceeded to the vicinity of Randolph and State Streets where we instituted surveillance.

Q. After the informant Harvey Jackson parked his car at the parking lot there on the southeast corner of Clark and Wacker, did you have occasion to see what he did, if anything?

A. He exited his vehicle and entered a bar which I believe is called the 225 Club.

Q. Where is that bar located?

A. It is located just south of the parking lot on the east side of Clark Street.

Q. Calling your attention to approximately 5:45 p.m.,

do you remember where you were at that time on December 29, 1965?

A. Yes, with Agent Meyer I instituted surveillance at the vicinity of Randolph and State Street.

Q. Did you see anybody you know at that location at that time?

A. Yes, there were other agents in the vicinity that I knew.

Q. Did you see anybody that you now know as a man named Sam Minerva?

[176] A. At approximately 6:00 p.m. I observed Sam Minerva standing——

Mr. Eskridge: Objection, your Honor. This is putting testimony in the witness' mouth. I have asked your Honor to admonish counsel about his leading the witness.

The Court: I will do it later. I can't—I do not agree that he is putting anything in the witness' mouth.

Do you feel anything in your mouth, Mr. Witness?

The Witness: No, your Honor.

The Court: The question, Mr. United States Attorney, is suggestive of an answer. Therefore, I will sustain the objection.

By Mr. McDonnell:

Q. Other than Agent Meyer and other agents of the Federal Bureau of Narcotics, did you see anybody else that you know?

A. Yes, I saw Sam Minerva approach the bus stop at the northeast corner of Randolph and State Streets at approximately 6:00 p.m., and I observed him stand in that bus stop.

[177] Q. What else, if anything, did you observe about Mr. Minerva?

A. He was carrying a white shoe box under his left arm.

Q. Calling your attention to a few minutes later, did you see anybody else in that area that you knew?

A. Yes, I observed the defendant James White driving east on Randolph Street from Wabash and he approached the bus stop.

Q. What happened then?

A. I observed the defendant White after he approached State Street, and he continued north on State Street out

of my view. A few minutes later I again observed him driving east on Randolph from Wabash to the bus stop.

Q. Do you remember what the defendant White was driving at this time?

A. A 1958 blue Chevrolet station wagon.

Q. What happened at that time?

A. He pulled into the bus stop and I observed Minerva enter his vehicle.

Q. Did you have occasion to do something then?

[178] A. I observed the defendant White with Minerva drive off, continue east on Randolph for approximately a half a block at which time I observed the defendant Minerva leave the 1958 Chevrolet station wagon and I noted that he was carrying a black leather briefcase under his left arm.

Q. What happened then?

A. I instituted surveillance of Sam Minerva.

Q. Now calling your attention to approximately one hour or an hour and ten minutes later, approximately 7:10 p.m., did you have occasion to be on the south side of the City of Chicago?

A. Yes, I did.

Q. Where were you, if you remember?

A. I was in the vicinity of Stony Island and Midway Plaisance.

Q. What happened at that location?

A. I instituted surveillance of Harvey Jackson's automobile.

Q. What specifically did you do?

A. I followed Harvey Jackson as he drove to the vicinity of 62nd and South Drexel. He parked his car at that location and I was joined there by Agent Meyer.

[179] Q. What happened at that location?

A. Agent Meyer and I approached Harvey Jackson's vehicle and Harvey Jackson handed me a brown paper bag which I examined.

Q. Will you tell the ladies and gentlemen of the jury what you found in the brown paper bag, if anything?

A. Upon examination I found that the brown paper bag contained an inner brown paper bag which contained a white paper bag which further contained a plastic bag which contained a quantity of white power.

Q. What did you do then?

A. I performed a marquis reagent field test on a small portion of the white powder which was contained in the plastic bag.

Q. What was the result of your field test?

A. I observed a positive reaction which indicated to me the presence of an opiate.

Q. What did you do then, Agent DeFauw?

A. I retained custody of the evidence and then I searched Harvey Jackson's person and found neither narcotics nor money on him.

[180] Subsequent to the search I removed the kel set transmitter from his person.

Q. Did you have occasion to do anything then?

A. I observed Agent Meyer as he searched Harvey Jackson's vehicle. He found neither money nor narcotics in the vehicle.

Q. Then what happened?

A. We had a conference and then we returned to the offices of the Bureau of Narcotics where I weighed, tested and sealed the evidence.

• • • • •

[188] Q. Agent DeFauw, calling your attention to the 5th day of January, 1966, did you have occasion to be in the vicinity of 67th and Stony Island Avenue in Chicago around 5:00 p.m.?

A. Yes, sir, I did.

Q. What, if anything, happened there?

A. I was in the presence of Agent Jackson, Harvey Jackson and Agent Kerstann.

Q. What, if anything, took place at that location and at that time?

A. We had a conference, and subsequent to the conference I searched Harvey Jackson. I found neither narcotics nor money on his person. I then placed the kel set transmitter beneath his outer clothing. I tested it to make sure it was functioning properly.

Q. Was it functioning properly?

A. Yes, sir, it was.

Q. What happened then?

A. I then observed Agent Jackson search Harvey Jackson's vehicle. He found neither narcotics nor money.

[189] Q. Calling your attention to approximately 5:30 p.m. in the vicinity of 6141 South Drexel, did you have occasion to be in that location at that time?

A. Yes, I did.

Q. What were you doing there, sir?

A. Prior to arriving there, I furnished Harvey Jackson——

Mr. Eskridge: Objection. The question was what was he doing there.

The Court: I think that is right.

Mr. Eskridge: I move it be stricken.

The Court: That was the question. Will you answer that question, please, Mr. Witness.

By the Witness:

A. I instituted surveillance of Harvey Jackson's residence at 6141 South Drexel.

By Mr. McDonnell:

Q. Calling your attention to approximately 5:00 p.m. on the 5th of January, 1966, did you have occasion to——

Mr. Eskridge: Objection, your Honor. This is what I am objecting to. He is suggesting in the form of questions the answers to be given by the witness.

[190] The Court: I haven't heard the question yet. I can't tell. I overrule the objection.

By Mr. McDonnell:

Q. You testified that you—Strike the last question, please—You testified that you strapped a kel set onto the informant Harvey Jackson around 5:00 p.m. at 67th and Stony Island Avenue, is that correct, sir?

A. That is correct.

Q. Did you do any other thing to the informant?

A. Yes. I furnished Harvey Jackson with $1300 of previously-recorded official advance funds.

Q. What happened then, sir?

A. Harvey Jackson and Agent Jackson then entered Harvey Jackson's vehicle and proceeded to 6141 South Drexel.

Q. What did you do?

A. I instituted surveillance in that vicinity.

Q. Calling your attention to 6:20 p.m. that night, did you have occasion to see anybody that you knew?

[191] A. Yes, sir, I did.

Q. Who did you see?

A. I observed the defendant James White park his 1962 black Cadillac convertible in front of the informant's residence and enter 6141 South Drexel.

Q. What happened after his entry into that location, sir?

A. After his entry I heard the defendant White's voice and I heard Harvey Jackson's voice.

Q. Do you know what they said?

A. Just generally. I recollect just generally what the conversation was.

Q. Give us your general recollection.

Mr. Eskridge: Objection.

The Court: I would say that the better form to ask the witness what he heard as best he can recall.

Mr. McDonnell: All right, your Honor.

The Court: I sustain the objection to the question as put.

By Mr. McDonnell:

[192] Q. Agent DeFauw, would you tell his Honor, Judge Hoffman, and the ladies and gentlemen of the jury the conversation that you heard between the defendant James White and the informant Harvey Jackson as you remember it?

A. As I remember, I heard the defendant White state, "Do you have the $1300?"

I heard Harvey Jackson state that he did.

Q. Is that the extent of the conversation as you recall it, sir?

A. I heard Harvey Jackson mumbling some numbers, and then I heard the defendant White say, "Let me count the money so I know it's right." Then I heard the defendant White mumble some numbers.

Q. Is that all you heard or all that you remember hearing, sir?

A. To the best of my recollection, yes.

Q. Is your recollection exhausted as to what you heard on that occasion?

A. Yes, it is.

Q. Can your recollection be refreshed by anything?

A. Yes.

Q. What will refresh your recollection?

[193] A. The written report which was submitted which contained the events that took place on that date.

Mr. McDonnell: Mark this as Government's Exhibit W.

(Said exhibit was thereupon marked Government's Exhibit W for identification.)

By Mr. McDonnell:

Q. I now show you, Agent DeFauw, what has been previously marked as Government's Exhibit W for identification and I ask if that will refresh your recollection?

A. Yes, it will.

Q. Would you look it over, please?

Have you finished?

A. Yes, I have.

Q. Does that refresh your recollection, sir?

A. Yes, sir, it does.

Q. Would you tell Judge Hoffman and the ladies and gentlemen of the jury the conversation as your recollection is refreshed on it?

[194] A. After I heard the defendant James A. White finish counting the $1300, I then heard him advise the informant that the informant owed him an additional $950 and he wanted the money by Friday.

He also instructed the informant that he was to pay the money at the Dining House Aluminer at 7:00 p.m. on the date requested. He stated that he might leave town and he wanted to get stuff not only for the informant but also for Harry B. and his brother. He then stated that he would like the informant to purchase $12,000 worth of heroin at a time and he stated that the informant would have to come up with the money in advance before he would make the delivery. He stated that there was going to be a panic in the near future. He then said that he had to leave, he had a couple more stops to make, and that terminated the conversation.

Q. After the conversation was terminated, what, if anything, occurred?

A. I observed the defendant White leave 6141 South Drexel, enter his '62 Cadillac convertible, and I followed him to the vicinity of 76th and South Halsted.

[195] Q. What happened at that location?

A. I observed the defendant White enter the Dining House Aluminer Restaurant located at 7537 South Halsted.

Q. Do you know who owns that restaurant?

A. No, sir, I do not.

Q. What happened after the defendant White entered the restaurant?

A. I continued surveillance in that area until approximately 12:00 midnight when the surveillance was discontinued.

Q. What did you do then?

A. Returned to the offices of the Bureau of Narcotics.

Q. Calling your attention to January 7, 1966, at approximately 5:30 p.m., did you have occasion to be in the vicinity of 59th Street and Stony Island Avenue in the City of Chicago?

A. Yes, sir.

Q. Were you alone, sir?

A. I was with Agent Kerstann.

Q. Were there any other people around that you knew?

A. There were other agents in the vicinity.

[196] Q. What happened at that location and at that time?

A. We met with Harvey Jackson and we had a conversation.

Q. After the conversation ended, what, if anything, did you do?

A. I searched Harvey Jackson, found neither money nor narcotics on his person. Then I placed the kel set transmitter on Harvey Jackson beneath his outer clothing. I tested the transmitter to make sure it was working.

Q. Was it in working condition?

A. Yes, it was.

Q. What happened then?

A. Agent Kerstann searched Harvey Jackson's vehicle, found neither money nor narcotics in it. I then furnished Harvey Jackson with $950 of previously-recorded official advance funds.

Q. What happened after you gave the $950 to Harvey Jackson?

A. I then followed Harvey Jackson as he drove to the vicinity of 76th and South Halsted Street.

Q. What did you see at that location?

[197] A. I observed him park his vehicle almost directly across the street from the Dining House Aluminer, which is a restaurant.

Q. Then what happened?

A. I observed him leave his vehicle and enter that establishment.

Q. After Harvey Jackson entered the establishment, the Dining House Aluminer, what, if anything, did you do?

A. I continued survellance in the vicinity of the establishment.

Q. Calling your attention to approximately 7:00 p.m., what, if anything, did you do at that time?

A. I heard the voice of the defendant James A. White.

Mr. Eskridge: Objection, your Honor. The question was what did he do.

The Court: What did you?

By the Witness:

A. I continued surveillance in the vicinity of 7537 South Halsted.

By Mr. McDonnell:

Q. Did you hear something at that time?

[198] A. Yes, I did.

Q. What did you hear?

A. I heard the voice of the defendant James A. White and I heard the voice of Harvey Jackson.

Q. Will you relate to the best of your memory what you heard Harvey Jackson say and what you heard James A. White say?

A. At this time I don't recall exactly the nature of the conversation.

Q. Is your memory totally exhausted as to the nature of the conversation?

A. Yes, it is.

Q. Will something refresh your recollection?

A. Yes.

Q. What will refresh your recollection?

A. The memorandum report which was prepared which contains the events that happened on that date.

• • • • •

[200] Q. I show you what has been previously marked as Government's Exhibit V and ask you if that refreshes your recollection, sir?

A. Yes, it does.

Q. Would you tell Judge Hoffman and the ladies and gentlemen of the jury the conversation you overheard at that time and place?

A. I heard the defendant White say "I'm going to pick your stuff up tomorrow."

He then asked Harvey Jackson if he had the $950, and I heard Harvey Jackson answer that he did.

I then heard Harvey Jackson count various numbers, after which I heard him say, "Now you count it to make sure it's right."

Then I heard the defendant White's voice count the money. He advised Harvey Jackson that the price of the heroin would increase $100 per eighth of a kilogram, and he further advised Harvey Jackson that he would meet [201] him at Randolph and Wells Street and he asked Jackson if he knew where that was. Then I heard the defendant White state "Instead of meeting me at Randolph and Wells, meet me at Lake and Wells."

Mr. Eskridge: I am sorry. I missed that.

The Witness: At 6:00 p.m.

• • • • •

By Mr. McDonnell:

Q. Was that the end of the conversation?

A. No, it wasn't.

Q. Would you relate a further conversation if you remember it?

A. I also heard the defendant White state that he was going to get three things, and that the package that he was going to give the informant, the informant would be required to pay $2,500 for the amount which he was to receive.

I further heard the defendant White state he wanted [202] the informant Jackson to sit on the other things for him.

Q. What happened then, Agent DeFauw?

A. That terminated the conversation.

Q. What, if anything, did you do at that time?

A. A short while later I observed Harvey Jackson leave the Dining House Aluminer, enter his vehicle, and he drove to the vicinity of 76th and Vincennes Street where Agent Kerstann and I met him.

Q. What happened at that time at that location?

A. I had a conversation with Harvey Jackson. Subsequent to the conversation I searched him and found neither money or narcotics on his person.

I then removed the kel set transmitter from his person and advised him to meet me on January 8th at approximately 3:30 p.m.

Q. Now calling your attention to January 8, 1966, at approximately 6:00 p.m., did you have occasion to be in the vicinity of State and Randolph Streets here in the City of Chicago?

A. Yes. I was in that vicinity.

[203] Q. What were you doing there?

A. I was conducting surveillance.

Q. Conducting surveillance on what?

A. Of the vicinity of the bus stop, which is located at Randolph and State.

Q. Did you see somebody that you knew?

A. Yes, I observed Sam Minerva standing in the bus stop which is located at the northeast corner of Randolph and State Streets.

Q. What was he doing?

A. He was standing at the bus stop and he had a brown leather briefcase under his left arm.

Q. What happened at that time?

A. I continued surveillance of Sam Minerva along with other agents.

Q. Do you know Agent Allen Pringle and Agent Charles Hill of the Federal Bureau of Narcotics?

A. Yes, sir, I do.

Q. Did you have a conversation with them that day at that time?

A. Agent Pringle advised me that——

Mr. Eskridge: Objection.

[204] The Court: Yes. The answer to that is yes or no. Did you know?

That is what you want to know, isn't it?

Mr. McDonnell: Yes, sir.

By the Witness:

A. Yes, sir, I do know them.

The Court: He says he knew them. Ask another question.

By Mr. McDonnell:

Q. Did you have a conversation with them at around 6:00 or 6:05 p.m.?

A. Yes, I did.

Q. After this conversation what did you do?

A. I remained in the vicinity of the bus stop in which Sam Minerva was standing.

Q. Did you see anybody at around 6:05 p.m. that you knew?

A. Yes, I observed the defendant James A. White driving a 1958 blue Chevrolet station wagon.

Q. What did he do, if you know?

A. He was driving east on Randolph Street from Wabash and as he approached State Street, he drove north on State Street out of my view.

[205] Q. Did you have occasion to see him at any other time that night?

A. Yes. A few minutes later I observed him driving from Wabash onto Randolph Street in an easterly direction—in a westerly direction toward State Street.

Q. What did you do then?

A. I observed the defendant White pull in to the curb at the bus stop, reach over, open the right-hand passenger door of the station wagon.

Q. Where were you at this time?

A. I was approximately two feet from Sam Minerva.

Q. Would you tell us the conditions of the sidewalk there at that time?

A. There were many people standing in the bus stop.

Q. All right. Now after Mr. White pulled over in his car, what, if anything, occurred?

A. I observed the defendant White open the passenger door on the right side of his vehicle and I observed Sam Minerva approach the car. I heard the defendant White say, "Come on, man, give me the package. I've got to [206] get out of here."

Q. What happened then?

A. I observed Sam Minerva hand the brown leather briefcase into the car and state that he would pick up the money later.

Q. What did you do then, if anything?

A. At that time I immediately identified myself as a federal narcotic agent and placed the defendant White under arrest.

Q. What happened after you placed the defendant White under arrest?

A. I seized the brown leather briefcase which Sam Minerva handed him.

Q. What did you do with the brown leather briefcase?

A. I retained custody of the briefcase and later examined its contents.

Q. What did you find in the briefcase?

A. Inside the briefcase I observed four brown paper packages.

Q. Did you look into these packages or what did you do with these packages?

A. I examined the packages in the presence of Agent Meyer, Agent Vinsik and Agent Kerstann.

[207] Q. What did you find?

A. I found each of the brown paper packages to contain a white paper bag which further contained a plastic bag which contained a quantity of white powder.

Q. What, if anything, occurred at that time?

A. I performed a marquis reagent field test on a small portion of the white powder contained in the packages in the presence of Agents Kerstann, Vinsik and Meyer, and I observed a positive reaction indicating the presence of an opiate.

Q. Did you have occasion to do something with the four packages that you had?

A. I retained custody of them.

Q. What happened then, Agent DeFauw?

A. That evening I returned to the offices of the Bureau of Narcotics.

Q. Did you do anything at the Bureau of Narcotics?

A. Yes, I maintained custody of the evidence and I placed the evidence in my personal locker for safekeeping.

Q. Calling your attention to December 12, 1966——

[208] The Court: Do you mean that?

Mr. McDonnell: Excuse me, January 12, 1966.

By Mr. McDonnell:

Q. Did you have occasion to do something with the packages that you received on January 8, 1966?

A. Yes, I removed the brown briefcase and the four brown paper packages and all the contents from my personal locker and I weighed, tested and sealed the evidence in two separate lock-seal type evidence envelopes in the presence of Agent Kerstann.

• • • • •

---

[228] William C. Kerstann, a witness called by and on behalf of the government, having been first duly sworn, was examined and testified as follows:

Direct examination.

• • • • •

[229] Q. Calling your attention to approximately 8:25 p.m. on the night of December 16, 1965, do you know where you were at that time?

A. Yes, sir, I do.

Q. Where were you?

A. I was in the vicinity of State and Randolph, Chicago, Illinois.

Q. What were you doing there, sir?

A. At that time Agent DeFauw and I were conducting surveillance of James A. White who at that time was in a 1958 model Oldsmobile owned by Harvey Jackson.

Q. Did you see the defendant James White on that occasion?

A. Yes, sir, I did.

Q. Would you point out the man you saw on that occasion?

A. He is the gentlemen seated at the defense table directly to the left of Mr. Eskridge.

Mr. McDonnell: Let the record reflect, your Honor, the fact that the witness has identified the defendant in this [230] cause?

The Court: The record may indicate that this witness has identified the defendant in open court.

By Mr. McDonnell:

Q. Agent Kerstann, you say you were with Agent DeFauw at this time, is that correct?

A. Yes, sir.

Q. What, if anything, did you see the defendant do?

A. I observed Mr. White drive west on Randolph Street in the 1958 Oldsmobile. As he approached the intersection of State and Randolph, he stopped the automobile at that location and motion to a white male subject who was standing in the bus stop on the northeast corner of State and Randolph.

Q. Do you know who the white male subject was, or did you know at that time who the white male subject was?

A. At that time, no, sir, I did not.

Q. Do you know who he is now, sir?

A. Yes, sir, I do.

Q. Do you know his name?

[231] A. Yes, I do.

Q. What is that name?

A. His name is Sam Minerva.

Q. After the defendant motion to Mr. Minerva, what happened, if you remember?

A. The subject came over and entered the car on the passenger side and then Mr. White continued driving west on Randolph. At approximately Clark and Randolph the white male subject left the car and walked out of my view.

Q. What did you do then?

A. At that time Agent DeFauw left the car and I continued to follow Mr. White.

Q. Where did you follow him?

A. I followed him to the intersection of Lake and Wells.

At that time he stopped the car and he motioned to Harvey Jackson or Harvey Jackson, who was standing on the southwest corner, entered the car at that time.

Q. What happened then?

A. At that time I heard a conversation which was transmitted by a radio transmitter which was on the informant's person.

Q. Did you recognize the voices in the [232] conversation or the voice in the conversation?

A. Yes, I did.

Q. Whose voices were they?

A. They were the voices of Harvey Jackson and Mr. White.

Q. Had you heard the voice of Harvey Jackson before this time?

A. Yes, sir, on numerous occasions.

Q. Had you heard the voice of James A. White before this time?

A. Yes, sir, on several occasions also.

Q. You recognized these voices, is that correct?

A. Yes, sir, I did.

Q. To the best of your memory, Agent Kerstann, will you repeat the conversation that was had between the defendant White and the informant Harvey Jackson?

A. Mr. White said that he had just met his man on time and gotten the package from him. He then told Harvey Jackson that he would leave the package on the seat beside him and in case he got stopped by the police, he could get rid of it. Then Mr. White said that he had to meet [233] another man and that he would have to go.

Q. Then what happened, if you remember?

A. At this time Mr. White left the car at the intersection of Lake and Wells. I stopped behind them a short distance away, approximately half a block, and then I watched Mr. White proceed out of my view.

After he had proceeded out of my view, I got out of my car and walked up to Harvey Jackson's car.

Q. What did you do when you got to Harvey Jackson's automobile?

A. I entered the car with Harvey Jackson and at that time Harvey Jackson pointed to the brown paper sack which was on the seat beside him.

Q. After he pointed to the brown paper sack, what happened?

A. I parted the top of the brown paper sack and I noticed that it contained a white paper sack, and I did not do anything further with the sack at this time.

Q. I now show you what has been previously marked as Government's Exhibit No. 5 for identi- [234] fication and No. 6 for identification and I ask you if you recognize these two items, sir?

A. Yes, I can identify these.

Q. What are these items?

A. These are the two sacks. They are a different color at this time because they have been processed through certain chemicals. These are the two sacks which I saw in the front seat of Harvey Jackson's vehicle.

Q. How do you recognize them?

A. The 3-by-5 card which is attached to them bears my initials.

Q. What did you do after you saw these sacks?

A. I had a short conversation with Harvey Jackson and after that conversation Harvey Jackson drove to the area of Columbus Drive and Congress.

Q. What occurred at that location?

A. We stopped at that location and waited for Agent DeFauw.

Q. Did Agent DeFauw come to that location?

A. Yes, he did.

Q. About what time did he arrive there?

A. I don't recall the exact time. It [235] was sometime between 9:00 and 9:30 p.m.

Q. What occurred when he did arrive there?

A. He entered the car at that time and at that time Mr. Jackson pointed to the brown paper sack and Mr. DeFauw picked it up, or he handed the sack to Mr. DeFauw. Mr. DeFauw then opened the sack and took out the white paper sack.

Q. What happened then?

A. He then opened the white paper sack and I noted that it contained a plastic bag which contained a large quantity of white powder.

Q. What, if anything, did you do or did you see?

A. I then observed Agent DeFauw perform a marquis

reagent field test on a sample of this white powder and I noticed a positive reaction.

Q. What happened then?

A. Agent DeFauw then searched the informant. He found no money nor narcotics at this time. Then he removed the small radio transmitter from the informant's person.

Q. Did you have occasion to do anything then?

A. Yes. After Agent DeFauw and Mr. Jackson [236] left the car, I searched the car and found no money nor narcotics in the car at that time.

Q. What happened after you searched the informant's car?

A. Agent DeFauw, Mr. Jackson and I then came to the office of the Bureau of Narcotics.

Q. What occurred there, if you remember?

A. At that time Agent DeFauw removed the evidence and placed it in a substitute container. I initialed the container, then Agent DeFauw weighed it and sealed it in a government lock-sealed evidence envelope.

* * * * *

[239] Q. Now, Agent Kerstann, do you know Harvey Jackson?

A. Yes, sir, I do.

Q When did you first know him? When did you first meet him?

A. I first met him sometime the first part of December, 1965.

Q. Have you seen him since?

A. Yes, sir, I have.

Q. When was the last time you saw him?

A. To the best of my recollection, it was sometime in the month of March of 1966.

Q. Do you know where he was living on that occasion?

A. At that time I believe he was still living on South Drexel here in Chicago.

Q. Did you talk to him on that occasion?

A. Yes, sir, I did.

Q. Have you since talked to him?

A. Yes, sir, I have.

Q. Do you know where he is now?

A. No, sir, I do not.

[240] Q. When was the last time you had any contact with him?

A. To the best of my recollection, it would be sometime in either the month of June or July of this year.

Q. Have you made any efforts to contact him?

A. Yes, I have.

Q. Would you tell exactly what efforts you have made to contact Harvey Jackson?

A. Well, I have contacted his wife on several occasions in an attempt to elicit from her information as to his whereabouts, and on each occasion she would not tell me or she would not give me any information in regard to where he might be.

Q. Is that all you have done?

A. No, sir. I have also conducted a search through the Chicago Police Department. I also contacted the Motor Vehicle Department in regard to his driver's license and also any information on his 1966 registration on his car. We did obtain that, but it was registered to [241] his old address.

Q. What else have you done, if anything?

A. We have also contacted the Milwaukee Police Department in regard to the fact that we figured or we had a belief he may be in that area.

Q. What did that contact reveal, if anything?

A. It revealed negative information as far as we were concerned.

Q. When was the last time that you contacted Harvey Jackson's wife concerning the whereabouts of Mr. Harvey Jackson?

A. I have attempted in the last couple of days but I have been unsuccessful. The last time I successfully contacted here would probably be about sometime in the month of September.

Q. Have your attempts to locate—what have your attempts to locate Harvey Jackson revealed, if anything?

A. Well, they reveal, I believe, he is still in the Chicago area but as far as an exact location, I have been unable to find him.

• • • • •

Cross-Examination.

[242] By Mr. Eskridge:

• • • • •

[254] Q. You say you last contacted his wife [255] Mrs. Jackson in September, 1966; how did you contact her?

A. By telephone.

Q. Did you ever see Mrs. Jackson?

A. Not to my recollection, no.

Q. How do you know it was Mrs. Jackson you were talking to?

A. She answered my questions in regard to her husband Harvey so I assumed that it was Mrs. Jackson.

Q. Did you ask her?

A. I asked her if she had heard from her husband.

A. And this person on the other end of the telephone said what?

A. Said yes, that she had.

Q. What else did she say?

A. She said that he had had an automobile accident, that he had been in the hospital for a short time, and that she did not know where he was at this time.

Q. Did you ask her which hospital he was in?

A. Yes, I did.

Q. Which hospital was he in?

[256] A. She did not know.

Q. Did you check the hospitals?

A. I checked a few hospitals. I could not check every hospital in the area. And she was under the impression that the accident did not happen in Chicago, so I had no way of checking every hospital in the State of Illinois.

Q. Did you ask her where approximately this hospital was?

A. I did, yes.

Q. What did she say?

A. She did not know.

Q. Did you check any of the local hospitals around the City of Chicago?

Mr. Mc Donnell: Objection, your Honor. Asked and answered.

The Court: I think the question was answered. I will sustain the objection.

By Mr. Eskridge:

Q. Did you search the records of automobile accidents kept by the Secretary of State?

A. Yes, I did.

Q. What did you find out?

A. I could find no record of any auto- [257] mobile accident involving Mr. Jackson.

Q. Did you check with the Chicago Police Department to see whether or not they had him under arrest?

A. Yes, I did.

Q. What did you find out?

A. No record.

Q. Did you check the Cook County Hospital?

A. I don't recall.

Q. You don't. Did you or didn't you?

Mr. Mc Donnell: I object to counsel arguing with the witness.

The Court: That is argument. I sustain the objection.

By Mr. Eskridge:

Q. Did you check Provident Hospital?

The Court: Will you let me rule on the objection, sir, if you don't mind?

Mr. Eskridge: I am sorry. I withdraw the question.

The Court: I have a place in this, too. This isn't just between you and the witness, sir.

I sustain the objection.

[258] By Mr. Eskridge:

Q. Did you check at Provident Hospital?

A. I don't recall which hospitals I checked, sir.

Q. You have no recollection at all?

A. Not at this time, no.

Q. Why did you check the Milwaukee Police Department?

A. Because for a period of time I was receiving long distance telephone calls from Mr. Jackson from Milwaukee.

Q. Did you check the hospitals there?

A. No, sir, I did not.

Q. Did you check the Municipal Court index to see whether or not he was in jail?

Mr. Mc Donnell: Object, your Honor, as asked and answered.

The Court: I sustain the objection.

The Municipal Court index wouldn't indicate whether a man was in jail or not. He might be in jail as a result of my order. That wouldn't appear in the Municipal Court index.

By Mr. Eskridge:

[259] Q. Did you check the Police Department arrest records to see whether or not he was under arrest?

Mr. Mc Donnell: I object. I believe that has been asked and answered.

The Court: I will sustain the objection.

By Mr. Eskridge:

Q. Did you check the files of this court to see whether or not he was under arrest in this court?

A. I don't believe I did, sir.

Q. When you say you tried within the last couple of days, what did you do?

A. I called Mrs. Jackson.

Q. Where did you call her?

A. I tried her home phone number.

Q. You tried her home phone number. Did anybody answer?

A. No, sir.

Q. And that is the extent of it?

A. No, I tried another phone number.

Q. What number? What other phone number did you try?

[260] A. It is a phone number of where she works at this time.

Q. Did you talk to her?

A. No, sir, I did not.

Q. Would you give us that telephone number?

Mr. Mc Donnell: I object to that, your Honor.

The Court: Why?

Mr. Mc Donnell: I don't think it is relevant in this case.

I tell you what, Judge, I will withdraw the objection and we will give Mr. Eskridge the telephone number.

The Court: If you know it, you may give it.

The Witness: I don't know the phone number as such. I know the building she works in and how she can be reached. The phone number is in my files in the office.

Mr. Eskridge: I take it counsel will give me the telephone number and address.

Mr. Mc Donnell: You can have it right now, Mr. Eskridge.

Will you be good enough to write it [261] down and give it back to me, please?

By Mr. Eskridge:

Q. Did you call at this telephone number where she works to talk to her?

A. I called the number. I did not talk to her, no.

Q. Is this within the last couple of days?

A. Yes, sir.

Mr. Eskridge: That is all.

The Court: Have you finished your cross examination?

Mr. Eskridge: Yes, your Honor.

* * * * *

---

[263] David Joseph Connolly, a witness called by and on behalf of the government, having been first duly sworn, was examined and testified as follows:

Direct Examination.

* * * * *

[267] Q. Calling your attention to around 5:45 p.m. on December 29, 1965, did you have occasion to see the defendant James A. White at that time on that day?

A. Yes, I did.

Q. Where did you see him?

A. As he departed from Hyman's Clothing Store.

[268] Q. What did you do?

A. I observed him as he walked north on the east side of the street to the parking lot where he had previously

parked his car. He entered his car then and drove to Clark Street and proceeded south. I followed him in my vehicle as he proceeded south to Lake Street. At Lake he turned east and he proceeded east on Lake Street to Wabash, south on Wabash to Randolph, and when he approached Randolph, he turned west. Then I continued to follow him. He manipulated the vehicle he was driving into the northbound or, rather, the northern lanes westbound until he reached the intersection of State and Randolph.

Q. What occurred there?

A. At that location I observed Agent Meyer. Agent Meyer signaled to me and I understood the signal and as a result of that I continued driving and I drove to the area of the tavern at 225 North Clark Street.

Q. Proceed.

A. And I continued to maintain surveillance at the tavern.

Q. Calling your attention to approxi- [269] mately 6:10 or 6:15 p.m., Agent Connolly, did you have occasion to see something at that time?

A. Yes, I did.

Q. What did you see, please?

A. While I was maintaining surveillance of the tavern, I saw James White accompanied by Harry B. Williams drive to and park in front of the tavern, the tavern that is at 225 North Clark Street. White was driving the car, Harry B. Williams was a passenger. White got out of the car and proceeded to and entered the tavern at 225 North Clark. He was in there just a short period of time, perhaps five minutes, and he left that tavern and he returned to his automobile and he drove that automobile south to Clark Street out of my view. I noticed at that time that Agent Meyer in his vehicle was following the vehicle driven by Mr. White.

Q. What did you do then?

A. I continued to maintain surveillance of the tavern.

Q. What was the next thing you saw, if anything?

A. At about 6:25 p.m. I saw Harvey Jackson [270] leave that tavern. He walked north to the intersection of Wacker Drive and Clark Street to the same parking lot that White had previously parked in and he entered his vehicle, a 1958 Oldsmobile.

Q. What did you do then?

A. I then continued to maintain surveillance of Harvey Jackson as he drove that vehicle south on Clark Street across Lake Street to Randolph where he also turned west. At that location he proceeded west to Walls and then north on Wells to Lake Street.

Q. What happened there, if you remember?

A. I noticed that the car previously driven by White was parked at the southeast corner of Wells and Lake Street. I saw Jackson as he drove his car and parked it in front of the stationwagon in which White and Williams were seated.

Q. What did you do then?

A. Again I continued to maintain surveillance and I saw White leave his car carrying a brown paper bag in his left hand. He walked to the driver's side of Jackson's car and he handed the brown paper bag through the window to Jackson [271] who was seated behind the wheel of his car.

Q. What happened then, Agent Connolly?

A. There appeared to be a brief conversation.

Q. Could you overhear that conversation?

A. Yes, sir.

Q. Did you recognize the voices in that conversation?

A. No, not both of them.

Q. After the conversation had ended, what happened, if you remember?

A. White returned empty-handed to his car and he seated himself behind the wheel, the driver's seat. Then I saw Harry B. Williams get out of White's car also carrying a paper bag. He carried that bag to the car of Jackson and he entered in the passenger side of the front seat with Jackson.

• • • • •

[273] Q. Calling your attention specifically to 5:15 p.m. on January 8, 1966, did you have occasion to see the defendant James White?

A. Yes, I did.

Q. Will you tell his Honor Judge Hoffman and the ladies and gentlemen of the jury what you saw, sir?

A. Again White left his house, again in the same vehicle, that is, the '58 blue Chevrolet station wagon which was parked outside. He got into the car, he drove that car from that location to the Dan Ryan, and as he reached the area

[274] of Garfield Park, as a result of congested traffic, I lost him from view.

Q. Calling your attention to approximately 6:05 p.m., January 8, 1966, do you know where you were at that time?

A. Yes, sir.

Q. Where were you?

A. I was parked in the vicinity of Randolph and State Streets.

Q. Did you have occasion to see somebody at that location?

A. Yes, sir.

Q. Who did you see?

A. I saw both a person by the name of Sam Minerva and I saw a car driven by White, the same car, as he approached the corner of State and Randolph.

Q. What, if anything, did you do?

A. I got out of my car as he approached that area, and then those two people were placed under arrest as a number of agents surrounded the area.

* * * * *

---

[309] Robert J. DeFauw, a witness called by and on behalf of the government, having been previously duly sworn, resumed the stand, was examined and testified further as follows:

* * * * *

Cross-examination.

By Mr. Eskridge:

* * * * *

[321] Q. Did you, as you sat in the car, record this conversation on something?

A. I wrote the conversation in longhand on paper. I took notes relative to the conversation, yes, sir.

[322] Q. You took notes of the whole entire conversation?

A. The conversation I understood, I took notes, yes, sir.

* * * * *

[377] ARTHUR LEWIS, a witness called by and on behalf of the government, having been first duly sworn, was examined and testified as follows:

Direct examination.

* * * * *

[379] Q. Calling your attention to December 29, 1965, at approximately 4:30 p.m., do you recall where you were, Mr. Lewis?

A. Yes, sir. I was on duty on December 29, 1965. I was in a radio car at the area of 7500 South Wentworth Street here in Chicago, Illinois.

Q. What were you doing there, sir?

A. I was in the radio car with Narcotic Agent David W. Connolly, who was the driver. We were maintaining a surveillance of the residence at 7500 South Wentworth at about 4:30 p.m. on that date.

Q. Do you know who lives there, or who lived there at that time?

A. Yes, sir, I did.

Q. Who lived there?

A. The defendant James White.

Q. Now specially calling your attention to approximately 4:30, what, if anything, did you see, sir?

A. At approximately 4:30 p.m. on December [380] 29, 1965, while in that area, that is, at 7500 South Wentworth, I observed the defendant James White leave that building. It is a one-family home. I observed him come out of the front door and enter a blue Chevrolet station wagon. I believe it was about a 1958, the year was about a 1958. He was carrying a small black briefcase.

Q. What then did you do, if anything?

A. After Mr. White entered the Chevrolet station wagon, Agent Connolly and I took up surveillance of the moving vehicle being driven by Mr. White.

Q. When you say you took up surveillance, do you mean you followed him, sir?

A. That is correct.

Q. Do you recall where you followed him?

A. It is my recollection that we followed him north on

State Street into the Loop area through Van Buren and then to the area of Clark and Wacker.

Q. When you got to the area of Clark and Wacker, what, if anything, happened, if you recall?

A. At about the southeast corner of Clark and Wacker, Mr. White pulled the car into [381] a parking lot, turned the car over to an attendant and got out.

Q. What did you do then?

A. I left the vehicle which was being driven by Agent Connolly and followed the defendant White into a tavern at —I believe the address was 219 North Clark.

Q. Are you sure of that address?

A. Yes, sir, I am sure it was 219 North Clark.

Q. What did you do after you went to the tavern?

A. Let's see. It was about 5:05 or 5:15 p.m. Mr. White had gone in before me. I came in immediately after him and I observed him standing at the center of the tavern talking to a man known to me as Harry B. Williams.

Q. How long did you remain in the tavern, Agent Lewis?

A. I remained in the tavern until approximately 6:45 or 7:00 p.m.

Q. Did the defendant James A. White remain in the tavern that long?

A. No, sir, he did not.

[382] Q. What did he do?

A. As I previously stated, at about 5:10 he entered the tavern. He talked with Harry B. White for about ten minutes and he left,—that is, the defendant White left at about 5:20 p.m. At about 5:25 p.m. Harry B. Williams left.

• • • • •

---

[391] VERNON D. MEYER, a witness called by and on behalf of the government, having been first duly sworn, was examined and testified as follows:

Direct examination.

• • • • •

[395] Q. Now calling your attention to approximately 6:05 p.m. on December 29, 1965, do you know where you were at this time, sir?

A. Yes, sir, I do.

Q. Where were you?

A. I was at the corner of State and Randolph Streets.

Q. What occurred there, if anything?

[396] A. At that time I saw James White drive to the northeast corner of State and Randolph in a 1958 blue Chevrolet station wagon. I saw a person that I now know as Sam Minerva who was carrying a white shoe box under his arm enter the car with James White.

Q. What did you do then, if anything?

A. I followed James White and Sam Minerva as they drove west on Randolph Street across State Street for about a half a block and then stopped. At that location the person I now know as Sam Minerva got out of the car carrying a black briefcase. He did not have the white shoe box.

Q. What happened then after Mr. Minerva exited car?

A. I received a signal from Agent Connolly and I then followed James White as he drove west on Randolph Street to the front of the Greyhound bus station. At that location he stopped his car and a person that I now know as Harry B. Williams entered the car with him.

Q. What did you do then?

A. I followed James White and Harry B. Williams to the front of the 225 Club on North [397] Clark Street.

Q. What happened at that location?

A. At that location James White got out of the car. Harry B. Williams remained seated in the car and James White entered the 225 Club.

Q. Did you have occasion to remain in that area?

A. I did until James White came out and returned to his car and drove to the southeast corner of Lake and Wells Street where he parked.

Q. What did you do?

A. I took a position on the corner of Lake and Wells where I could see Mr. White's car and waited.

Q. What, if anything, did you see?

A. A few minutes later I saw Harvey Jackson arrive in his car, park on the same corner in front of the car that James White was driving.

Q. Now you mentioned the name James White. Do you know the defendant in this cause, James A. White?

A. Yes, sir, I do.

Q. Will you point him out to me?

A. Yes, he is seated at counsel table [398] to my left on the left-hand of his attorney.

Mr. Mc Donnell: May the record indicate that the witness has identified the defendant in open court, your Honor?

The Court: Yes, the record may indicate that this witness has identified the defendant White in open court.

By Mr. Mc Donnell:

Q. Now after you saw the defendant James White park his automobile, what, if anything, occurred?

A. James White got out of his car carrying a brown paper sack, walked to the driver's side of Harvey Jackson's car and handed the sack to Harvey Jackson. He then asked Harvey Jackson if he would take Harry B. south with him and Harvey Jackson said yes.

Q. Did you recognize the voices on the transmitter?

A. Yes, sir, I did.

Q. Had you heard these voices before?

A. Yes, sir, I had.

Mr. Eskridge: I beg your pardon, your Honor, I missed some of this testimony.

[399] The Court: Would you like to have it read?

Mr. Eskridge: Yes.

The Court: Read it.

(Question read.)

The Court: You may continue.

By Mr. Mc Donnell:

Q. Did you recognize these voices?

A. Yes, I did.

Q. Whose voices were they?

A. They were the voices of Harvey Jackson and James White.

Q. Would you repeat to the best of your memory what the voices said?

A. Mr. White said, "Will you take Harry B. south with you?" And Harvey Jackson said, "Yes, I will."

Q. What happened then?

A. At that time Mr. White returned to his car and briefly thereafter Harry B. Williams got out of his car and walked to the car of Harvey Jackson and entered that car with him.

Q. What did you do on this occasion, if anything?

[400] A. I then followed Harvey Jackson and Harry B. Williams south via the Lake Shore Drive to Midway Plaisance, west on Midway Plaisance to about Kimbark Street where Harry B. Williams got out of the car. Harvey Jackson then continued and drove to 62nd and Drexel where he parked the car he was driving.

Q. What happened there, if anything?

A. At that location I was met by Agent DeFauw and the two of us entered the car with Harvey Jackson.

Q. What occurred then?

A. Harvey Jackson then gave Agent DeFauw a brown paper sack which had inner containers holding a white powder.

Q. What happened then?

A. Agent Defauw removed the radio transmitter from Harvey Jackson, and in my presence conducted another search of Harvey Jackson and his automobile.

* * * * *

---

[429] KENNETH CLOUD, a witness called by and on behalf of the government, having been first duly sworn, was examined and testified as follows:

Direct examination.

* * * * *

[430] Q. Agent Cloud, calling your attention to approximately 6:30 p.m. on January 7, 1966, do you know where you were at that time and on that date?

A. Yes, I was in the vicinity of the Aluminer Lounge located at 7537 Halsted Street.

Q. What were you doing there?

A. I was working in surveillance of the defendant James White.

Q. Calling your attention to specifically 6:30 p.m., what, if anything, did you do?

A. I went inside the Aluminer Club at that address and ordered a Schlitz beer and a hamburger and French fries.

Q. Do you know who was in the place at that time?

A. Yes, there was one female behind the bar and the defendant James White was seated at the bar.

[431] Q. Do you know Harvey Jackson?

A. Yes. Harvey Jackson was assisting the Bureau of Narcotics in the James White investigation.

Q. Did you have occasion to see Mr. Jackson that evening?

A. Yes, Harvey Jackson came into the Aluminer Lounge at approximately 7:00 or 7:10 p.m. and sat at the rear of the bar with the defendant James White.

Q. Did you see what they did, if anything?

A. Yes, Mr. Jackson had some conversation with the defendant.

Q. Could you overhear that conversation?

A. No, I couldn't. I wasn't close enough to them.

Q. What happened then?

A. During that conversation Harvey Jackson took out a sum of money. He counted that money on the bar and passed it to the defendant James White.

Q. What did White do, if anything?

A. White counted the money that he received from Mr. Jackson. He received the money [432] from Mr. Jackson and counted it.

Q. What happened then, if you remember?

A. They had some more conversation; then both Harvey Jackson and the defendant James White left the bar and walked to the rear of the club out through a back door.

Q. You could not see them after that, is that correct?

A. No, I couldn't.

Q. Did you have occasion to see the informant Harvey Jackson later on that evening?

A. Yes, they reappeared from the back of the club, Harvey Jackson and James White. They had some more conversation and then Harvey Jackson left the club altogether.

Q. About what time was this, if you remember?

A. Mr. Jackson left the club at approximately 8:00 p.m.

* * * * *

[475] Mr. Eskridge: My next motion, your Honor, is to exclude these radio conversations on two grounds: One, that the radio conversations are in violation of the Illinois Eavesdropping Statute and in violation of the public policy of the State of Illinois.

Mr. Mc Donnell: I object to that, your Honor. They are not in violation of the federal policy or federal law. The defendant may not be prejudiced by electronically overheard conversations as evidenced by Lopez vs. United States, 373 U.S. 427 and 440, a 1963 case, United States vs. Pullings, 321 Fed. 2d 287 at page 295, 1963, a Seventh Circuit case; United States vs. Victoria, 284 Fed. 2d 451 at page 455, 1960, [476] a Seventh Circuit case; On Lee vs. U.S., 343 U.S. 747, a 1953 case; Rathburn vs. the United States, 355 U.S. 107 at page 111; U.S. vs. Walker, 320 Fed. 2d 472 at pages 474 and -6; McGee vs. Williams, 329 Fed. 2d 470, 1964, a Seventh Circuit case.

The Court: Mr. Eskridge, you are not the only lawyer who has raised the point. In the present state of the law, it is against you.

Is your motion to strike all testimony relating to these radio communications?

Mr. Eskridge: Yes, sir. And in addition——

The Court: I deny the motion. We have gone into it carefully in numerous cases here and I am satisfied that that evidence is admissible.

Mr. Eskridge: Does the Court take into consideration both the Fourth Amendment and the Fifth Amendment to the Constitution?

The Court: To the extent that the cases did, I do.

Mr. Eskridge: Your Honor, I would like at this time to move the Court to require the government to give me a demonstration of this radio transmitter Kel set in order for the Court and the jury to determine whether it is possible to determine voice identification over one of these sets.

[477] The Court: What is your authority for that?

Mr. Eskridge: I have no authority except that the radio communications which were testified to by the government

were words which they said they overheard over their transmitter and which they identified as the voice of the defendant James White.

The Court: You may reply.

Mr. Mc Donnell: We object to this, your Honor. There is no authority for this. He is demanding now that we put on a proposed defense for him after we have finished with our case. He has had ample time to cross examine the witnesses relative to the voices heard over the sets and at this time we object to any other display.

The Court: I deny the defendant's motion.

* * * * *

---

[484] Canister Moore, a witness called by and on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Eskridge:

Q. What is your name?
A. My name is——

The Court: Oh, you are going to have to talk up. There is a man back there in the last row who wants to hear you.

By the Witness:

A. My name is Canister Moore.

By Mr. Eskridge:

Q. Spell your first name.
A. C-a-n-i-s-t-e-r.
Q. Where do you live, Mr. Moore?
A. 500 East 81st Street.
Q. What is your trade or occupation?
A. Photographer.

The Court: What is it?
The Witness: Photographer.

[485] By Mr. Eskridge:

Q. I show you Defendant's Exhibits Nos. 1 through 15 and ask you if you have seen those before.
A. Yes, sir.
Q. What are they?

Mr. Mc Donnell: Objection.
The Court: He may identify them. I will overrule the objection. He may tell what he thinks they are.

By the Witness:

A. Photographs.

By Mr. Eskridge:

Q. Do you know who prepared—who took the photographs and developed the photographs?
A. Yes, sir.
Q. Who?
A. Myself. I did.
Q. When did you take the pictures that are in your hand?
A. November 17th.
Q. That was last Wednesday?
A. Yes, sir.
Q. Would you look at Defendant's Exhibit No. 1, [486] the first one on top, and tell me does that truly portray what it purports to show as it existed on November 17, 1966?
A. This is a front entrance——

Mr. Mc Donnell: Objection, your Honor.
The Court: Yes, I will sustain the objection to the question.

By Mr. Eskridge:

Q. Does it truly portray what it purports to show as it existed on November 17, 1966?
A. Yes, sir, it does.
Q. Now look at each of those exhibits that are in front of you and tell me whether or not they truly portray what they purport to show as it existed on November 17, 1966.

Mr. Mc Donnell: I object to this, Judge.

A. 6141 Drexel.

Mr. McDonnell: I object to this. I don't know what he means by "entrance," your Honor. Is it the door or gate or——

The Witness: This is the open front door showing the stairs.

The Court: All he is doing now is trying to identify these exhibits. If they are not identified in a proper manner, we will deal appropriately with any offer that [489] is made.

Mr. McDonnell: Yes, sir.

By Mr. Eskridge:

Q. Which way was your camera facing as you took the photograph, Exhibit 3, and the entrance which you described?

A. My camera was facing east as I took the photograph.

Q. Now as you walked into the entrance at 6141 Drexel, in which direction did you walk to go into the entrance of the first floor group of rooms?

A. I walked east and made a turn to the left in order to go into the first room.

Q. As you stood there in that doorway, how many rooms did you see beginning at your left which would be westward and going to your right which would be eastward?

A. Two rooms visible.

Q. Would you describe the two rooms beginning to the left?

A. They would be to the right——

Q. To your right?

A. To my left.

[490] Mr. McDonnell: I object to Mr. Eskridge leading the witness here and correcting his——

The Court: Mr. Eskridge, may I suggest to you that all you may do at this point is have the witness identify the exhibits. If they are offered and admitted, you may then ask the witness some questions. All you may do now is have them identified if the witness can identify them.

I sustain the objection.

By Mr. Eskridge:

Q. Now as you stood there in the doorway beginning to your left and going to your right, how many rooms were there that you could see on the first floor?

Mr. McDonnell: Objection.
The Court: I sustain the objection.

By the Witness:

A. There were three rooms.

The Court: I strike the witness' answer and direct the jury to disregard it.
Did you understand me, Mr. Eskridge?
[491] Mr. Eskridge: Yes, your Honor.
The Court: You didn't seem to from your question that followed.

By Mr. Eskridge:

Q. Now I show you Exhibit No. 4 and ask you which way was your camera facing in that picture?
A. My camera was facing west.
Q. Exhibit No. 5, which way was your camera facing in that picture?
A. My camera was facing east.
Q. Would you describe the room that you were looking at as you looked east?

Mr. McDonnell: Objection, your Honor.
The Court: I sustain the objection.
Mr. Eskridge: I withdraw the question.
The Court: This witness is not here to tell about rooms yet. As I understand it, you are seeking to have Defendant's Exhibits 1 through 15, respectively, for identification, identified. The questions you are asking are not pointed toward identification; therefore I sustain the objection.

[492] By Mr. Eskridge:

Q. Will you look at Exhibit No. 6 and tell us in which direction was the camera facing on that picture?
A. The camera was facing east.
Q. And Exhibit 7?
A. The camera was facing east.

Q. Exhibit 8?
A. The camera was facing west.
Q. In which room?
A. In the farthest room.
Q. And the camera was facing which direction on No. 9?
A. The camera was facing east in the farthest room—pardon me, west, I am sorry.

Mr. McDonnell: I don't—may I object now, Judge, unless the witness clarifies his statement? I don't know which way the camera was.
The Court: I don't either.

By Mr. Eskridge:

Q. Would you look at Exhibit No. 9——

The Court: He made an answer to a question.

[493] By Mr. Eskridge:

Q. Tell us in which room you were and in which direction was the camera facing.
A. I was in the farthest room; the camera was facing west.
Q. Would you look at Exhibit No. 10 and tell us which room you were in and which way the camera was facing?
A. I was in the farthest room; the camera was facing west.
Q. Could you further identify the farthest room?
A. Yes.
Q. What kind of room was it?
A. It was——

Mr. McDonnell: Objection, your Honor.
The Court: I sustain the objection. We are not identifying rooms here, sir. I don't seem to get any contact with your mind. This witness may identify only the exhibit. He is not here at the moment to testify about the location of rooms. You may ask him only about those exhibits at this point, and if he can identify them, he may.

[494] By Mr. Eskridge:

Q. Would you look at Exhibit 11 and tell me——

The Court: Just ask him what they are.

By Mr. Eskridge:

Q. What is it?

A. Yes. It is a photograph of the farthest room facing west.

Q. The camera——

A. The camera was facing west.

Q. Would you look at Exhibit No. 12 and tell us what this is, which way the camera was facing?

A. The camera was facing west; the photograph is of the farthest room.

Q. Would you look at Exhibit No. 13 and tell us what that is and which way your camera was facing?

A. The camera was facing east and the farthest room.

Q. Would you look at No. 14 and tell us where that is and which way the camera was facing?

A. The camera was facing east and the farthest room.

Q. Would you look at No. 15 and tell me what that is?

[495] A. A photograph showing the west—west, and the entrance to the street.

Q. From where?

A. From the rooms and closets as they appear at 6141 Drexel.

Mr. McDonnell: I object. I don't think there has been a proper foundation for any of this.

The Court: Let me see them.

(Documents handed to the Court.)

The Court: Who are the boys in this picture? Are these your boys?

The Witness: No, sir.

The Court: They just happened to be there?

The Witness: Yes, sir.

The Court: The boys in the picture?

The Witness: Yes, sir.

The Court: The objections of the government to Defendant's Exhibits 1 to and including 15, respectively, for identification, will be sustained.

Mr. Eskridge: May I address the Court outside the presence of the jury, your Honor?

[496] The Court: On that ruling?

Mr. Eskridge: Yes, sir.

The Court: No, no. Those pictures just don't serve to prove anything. There has been no foundation laid for them and I will let my ruling stand. I will deny your request for a hearing outside the presence of the jury.

By Mr. Eskridge:

Q. Now the exhibits, Mr. Moore, Exhibits 1 through 15, where were you when these pictures were taken?

Mr. McDonnell: Objection, your Honor.

The Court: I sustain the objection.

I have sustained objections to the admission of these exhibits. You may not question the witness in respect to them now.

Mr. Eskridge: I want to ask him to describe the premises.

The Court: No. You may ask him anything that doesn't relate to exhibits which have been denied admission into evidence. That is, I do not say that any question you ask [497] will necessarily be proper; you certainly may not refer to exhibits, objection to which have been sustained.

Mr. Eskridge: Your Honor, one of the witnesses here testified that he was in a room, in the kitchen——

The Court: You just ask this witness any question you like that has nothing to do with these exhibits, and if they are proper, I will let the witness answer. If they are not, and if there is objection made, I will have to deal appropriately with the objection.

By Mr. Eskridge:

Q. Mr. Moore, as you approached the door, the outer door at 6141 Drexel, would you tell us on the front of the premises where that door was? Was it near the——

Mr. McDonnell: Objection to the leading question.

The Court: Yes. That is suggestive of the answer. I sustain the objection.

Mr. Eskridge: I withdraw the question.

[498] By Mr. Eskridge:

Q. Would you tell us how many doors lead into the front entrance of 6141 Drexel?

A. One door.

Q. Would you describe for us where that door is?
A. It is to the right of the building, to the south.
Q. At the south wall?
A. Yes, sir.
Q. How close to the south wall was that door?
A. Perhaps a foot or less.
Q. One foot or less?
A. Yes.
Q. Now as you opened the front door and stepped from the street into the entrance, what is the first thing you see?
A. A stairway.
Q. As you step into the inner—as you step into the door, what is the next opening that you see?
A. There is a door to the left.
Q. How far is that door from the entrance?
A. About three feet or more.
Q. Now as you stand in that door looking to the north, [499] how many rooms would you see beginning at your left?
A. One room.
Q. The room in front of you?
A. Yes.
Q. And is there another room that you may see from that door?

Mr. McDonnell: Objection, your Honor.
The Court: I sustain the objection.

By Mr. Eskridge:

Q. Would you describe the number of rooms that you see as you stand in that door?
A. Three rooms.
Q. Now did you go into the room—did you go in each of those three rooms?
A. Yes, sir.
Q. Describe each of the three rooms that you went into.
A. As you enter from the doorway, there is a large room to your left, there is a smaller room, and to your right there is a kitchen.
Q. Did you enter into the kitchen?
A. Yes, sir.
Q. Where was the opening in the wall which led into the kitchen?

[500] Mr. McDonnell: Objection.
The Court: I sustain the objection.

By Mr. Eskridge:

Q. Would you describe the west wall of the kitchen?
A. On the west wall is a door as you enter the kitchen.
Q. Where is that?
A. It is to the right.
Q. At which wall?
A. The south wall.
Q. Now did you enter the kitchen?
A. Yes, sir.
Q. How many doors did you see within the kitchen?
A. There was the rear entrance and the door to the right?
Q. Did you go into that door to the right that you speak of?
A. No, sir.
Q. On which walls were each of these doors?
A. A door on the west wall—east wall and south wall.
Q. Now would you describe the outward appearance of each of those doors.
[501] A. The outward appearance of each door is one flat layer of board.
Q. Did you within the kitchen see any doors or openings in the wall which had two doors?
A. No, sir.

Mr. McDonnell: Objection.
The Court: I sustain the objection.
Mr. McDonnell: I ask it be stricken.
The Court: I strike the answer of the witness and direct the jury to disregard it.
Mr. Eskridge: That is all, your Honor.
The Court: Is there any cross examination of this witness?
Mr. McDonnell: One question, your Honor.

Cross-examination.

By Mr. McDonnell:

Q. Were you ever in this house before November 17, 1966?

A. No, sir.

Mr. McDonnell: That is all.
The Court: You may go.

(Witness excused.)

• • • • •

---

[503] MARY JACKSON, a witness called by and on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Eskridge:

Q. Would you give us your name and your address?
A. Mary Jackson, 6549 Blackstone.

Q. Please keep your voice up. How long have you lived at 6549 Blackstone?
A. Approximately around about three weeks.

Q. From where did you move?
A. 6141 Drexel.

Q. Are you married or single?
A. I am married.

Q. To whom are you married?
A. To Harvey Jackson.

Q. Would you describe Harvey Jackson for us, his physical appearance?

Mr. McDonnell: I object to this.
The Court: I sustain the objection. I don't know how to describe a man. I don't know how the witness could [504] describe him. You mean is he tall, is he short?
Mr. Eskridge: Yes.
The Court: Is that what you want to know?
Mr. Eskridge: Yes, the physical description.
The Court: Is he tall or short?
The Witness: He is kind of short.
The Court: You don't object to short people, do you?
The Witness: No.

By Mr. Eskridge:

Q. Do you know what his height is?
A. Not exactly, I don't. I don't know whether he is—I don't know because I don't know my own.
Q. How long did you live at 6141 Drexel?
A. Two years.
Q. With whom did you live there?
A. By myself until February of this year.
Q. Who else lives there?
A. With my children.
Q. And who else?
A. And my husband, my husband and myself.
[505] Q. Who lives with you at 6549 Blackstone?
A. My husband and my children.
Q. And your husband's name is——?
A. Harvey Jackson.
Q. When is the last time you saw your husband Harvey Jackson?
A. Last night.
Q. Did anyone help you move from 6141 Drexel?

Mr. McDonnell: Objection, your Honor.

By the Witness:

A. My husband and——

The Court: I sustain the objection. If the witness made answer, I strike her answer and direct the jury to disregard it.

By Mr. Eskridge:

Q. Has your husband Harvey Jackson left the city as far as you know?

Mr. McDonnell: I object, your Honor.
The Court: I sustain the objection. She said she saw him last night.
Is that right, young lady?
The Witness: Yes, that is.

By Mr. Eskridge:

[506] Q. Within the last twelve months, do you know

whether or not your husband left the city for any extensive length of time?

A. Well, he had worked out of town.

Q. For how long a period of time?

A. Approximately around about a month or two, I think.

Q. Can you fix the time when that was?

A. No, I can't. I really can't because I didn't keep up with it too much.

Q. Was it in the winter of this year, the spring or the summer?

Mr. McDonnell: I object to that.

The Court: I sustain the objection.

You needn't answer that question.

By Mr. Eskridge:

Q. Can you fix the seasons of the year of 1966 when your husband went out of town?

Mr. McDonnell: Objection, your Honor. That is presuming he went out at all seasons.

The Court: I will sustain this objection. All you are entitled to ask is a "when" question, Mr. Eskridge.

By Mr. Eskridge:

[507] Q. Is that your best recollection, that you don't remember when it was?

A. Well, it could have been around about in July or August.

* * * * *

[508] Q. Now, Mrs. Jackson, I call your attention to on or about December 9, 1965. Were you living at 6141 Drexel at that time?

A. Yes, I was.

Q. Do you know a man named Carl Jackson?

A. No, I don't.

Q. I point to a man here, I point to a man who is Carl Jackson and ask you if you have ever seen this man before?

A. No, I haven't.

Q. What time in December, 1965, did you get off from work, if you were working?

A. I usually get off at four and be home at five.

Mr. McDonnell: Objection, your Honor. I don't know [509] what type of shift she worked in December, but I would imagine that she had hours. I don't know what day he is referring to or anything.

The Court: Yes. I think there should be a preliminary question. I will sustain the objection.

By Mr. Eskridge:

Q. On or about December 9, 1965, do you know what your working hours were?

A. From eight until four, and I would be home at five.

Q. When you came home, did you have a usual routine?

A. Well, I would come and do the usual thing, come in and prepare supper for the family.

Q. What time did you prepare your supper for the family?

Mr. McDonnell: Objection.

The Court: Why?

Mr. McDonnell: There is no date specified.

The Court: The date, as I understand it, is December 9, 1965. Is that what you want to know about?

[510] Mr. Eskridge: Yes, sir.

The Court: What day—what time did you prepare supper on December 9, 1965, is what the lawyer wants to know.

The Witness: Yes. Well, around about between five-thirty and six o'clock.

By Mr. Eskridge:

Q. Your dinner hour was how long?

A. Oh, around about an hour.

Q. What did you do after you finished dinner, if anything?

A. Well, the children sometimes would look at, watch television downstairs, and we would go upstairs.

Q. Now, Mrs. Jackson, how many kitchens are located at 6141 Drexel?

A. Only one.

Mr. McDonnell: Objection.

The Court: I will sustain the objection.

Mr. McDonnell: I ask it be stricken from the record and the jury be instructed to disregard the answer.

The Court: Yes. I direct the jury to disregard that ques-
[511] tion. If the witness made answer, I strike the answer and direct the jury to disregard it.

By Mr. Eskridge:

Q. Would you describe the rooms that are located on the first floor of 6141 Drexel?

A. There are six rooms on the first——. On the first floor?

Q. On the first floor.

A. No, there are three rooms on the first floor and a full bath.

Q. And on the second floor?

A. There is six rooms with a half bath.

Mr. McDonnell: Objection.

I withdraw the objection, your Honor.

The Court: I will let the question and answer stand.

Mr. Eskridge: I didn't hear either one. Counsel was talking.

The Court: You heard your question.

Mr. Eskridge: Counsel was talking as the witness was talking.

The Court: Oh, well. Do you want to ask your question again? You may.

Mr. Eskridge: Let the witness answer again.

[512] By Mr. Eskridge:

Q. Would you describe the rooms on the second floor?

A. There is six rooms on the second floor.

Q. Would you describe them?

A. There is a living room and then there is a——

Mr. McDonnell: I am going to have to object, your Honor. The second floor is not relevant.

The Witness: And a half bath.

The Court: Just a minute, please, Miss Witness—Madam Witness.

What is the relevancy of the second floor?

Mr. Eskridge: I will withdraw that question.

By Mr. Eskridge:

Q. Would you describe the rooms on the first floor of 6141 Drexel?

A. As you come in out of the hallway, you step into a living room. Then there is another small room and then a [513] kitchen, and then there is a full bath.

Q. Would you describe for us the kitchen?

A. The kitchen has a pantry. It has a back door, but the back door is always locked.

Q. You spoke of a pantry. On which wall in the kitchen is the pantry?

A. It would be to my right.

Q. What wall would that be, north, east, south or west?

A. I imagine it would be to the north.

Q. Now——

Mr. McDonnell: I am sorry, Judge. I didn't hear the witness' answer.

The Court: I didn't either.

Did you get it, Miss Reporter? Please read it.

(Record read.)

By Mr. Eskridge:

Q. With your back to the back door looking to the west or looking toward Drexel, on which wall was the pantry?

A. Well, it would be on the east wall then. Well, you have to kind of excuse me because I get my directions on [514] the north, east and south mixed up. But I know it is to my right as you come in through the door.

Q. As you walk into the kitchen, the pantry would be to your right?

A. To my right.

Q. How many doors were on that pantry?

A. Just one.

Q. Was there any other closets or pantries in that kitchen?

A. No.

Mr. McDonnell: Objection.

The Court: I will strike the answer. I strike the witness' answer and direct the jury to disregard it.

By Mr. Eskridge:

Q. Was there more than one pantry?
A. Just the one.
Q. Were there any other doors in the kitchen?
A. A back door but the back door was always locked.
Q. As you lived at 6141 Drexel, did you have any pets?
A. Yes, I had a Doberman and then a small dog.
[515] Q. A what?
A. A Doberman pinscher. Then I have a small dog.

The Court: What is a Doberman pinscher? I know but there may be some on the jury who do not know what a Doberman pinscher is.
The Witness: Well, she is a Doberman pinscher dog mixed with collie.
The Court: It is a big dog?
The Witness: Large dog.

By Mr. Eskridge:

Q. Where did you keep the large dog in December of 1965?
A. Always in the house.
Q. Was there a reason why you kept the dog in the house?

Mr. McDonnell: Objection.
The Court: I will sustain the objection.

By Mr. Eskridge:

Q. Why did you keep the dog in the house?

Mr. McDonnell: Objection.
The Court: I will sustain the objection.

By Mr. Eskridge:

[516] I show you Defendant's Exhibits Nos. 1 through 15——
The Court: Exhibits for identification.
Mr. Eskridge: I meant for identification.

By Mr. Eskridge:

Q. I ask you to look at Defendant's Exhibit No. 1 and tell us what that is, this picture here?

Mr. McDonnell: Objection.

The Court: I think the witness has a—he has a right to ask the witness what it is. That doesn't mean necessarily that it will be admitted.

Mr. McDonnell: I withdraw the objection.

The Court: But I think the witness may say if she knows what it is.

By Mr. Eskridge:

Q. What is it?

A. This is the house where I lived.

Q. Speak up so the jury can hear you.

A. This is the house where I used to live.

Q. As you look at that picture, what do you see?

Mr. McDonnell: Objection.

The Court: I will sustain the objection.

By the Witness:

[517] A. I see.

Mr. Eskridge: Hold it.

The Court: You needn't answer that question.

By Mr. Eskridge:

Q. Does that picture truly portray the entrance to 6141 as it existed in December, 1965?

A. Yes, it does.

Mr. McDonnell: Objection, your Honor.

The Court: If she thinks it does, she may answer. I will overrule the objection.

Mr. Eskridge: I offer into evidence at this time Defendant's Exhibit No. 1.

The Court: Show it to counsel.

Mr. McDonnell: I object to this, your Honor.

The Court: On what ground?

Mr. McDonnell: This is a picture of a door with a number on it. It is also a picture of the defendant James White and two children involved here.

The Court: I will sustain the objection to the offer.

Mr. Eskridge: Your Honor, that is not James White on [518] that picture.

The Court: I don't know who it is but it is obvious that the witness has not identified the exhibit correctly. Anyone who has eyesight can see that.

By Mr. Eskridge:

Q. Does it truly portray the door and entrance to 6141 as it existed in December of 1965?
A. It does.

Mr. Eskridge: I offer it again, your Honor.
The Court: Show it to counsel.
Mr. McDonnell: Same objection, your Honor.
The Court: There are some human beings in that picture whose presence has not been connected with this case, as far as I know. I must therefore sustain the objection.
Mr. Eskridge: Would the court accept the photograph without the human beings shown?
The Court: I won't bargain with you. I must take an [519] exhibit as it is offered. In its present form it is clearly inadmissible. Therefore I sustain the objection.

By Mr. Eskridge:

Q. Mrs. Jackson, there are some human beings on this picture. Do you know who they are?
A. I do.
Q. Who are they?
A. My grandchildren.
Q. And there is a man in this picture holding a light. Do you know who he is?
A. I don't, no.

The Court: The answer is no, I think. Is it not?
The Witness: Yes.
Mr. McDonnell: I didn't hear the answer.

By Mr. Eskridge:

Q. Would you look at Defendant's Exhibit No. 2 for identification and I ask you does it truly portray the outside of 6141 as it existed in December of 1965?
A. It does.

Mr. Eskridge: I offer Defendant's Exhibit 2 into evidence.

[520] Mr. McDonnell: No objection.

The Court: With no objection, Defendant's Exhibit 2 for identification may be admitted into evidence as Defendant's Exhibit 2.

(Said photograph, so offered and received in evidence, was marked Defendant's Exhibit 2.)

By Mr. Eskridge:

Q. I show you Defendant's Exhibit No. 3 for identification and ask you does it truly portray the premises as they existed in December of 1965?

A. It does.

Mr. Eskridge: I offer into evidence Defendant's Exhibit No. 3.

Mr. McDonnell: I have no objection to this.

The Court: With no objection, Defendant's Exhibit 3 for identification may be admitted into evidence as Defendant's Exhibit 3.

(Said photograph, so offered and received in evidence, was marked Defendant's Exhibit 3.)

By Mr. Eskridge:

[521] Q. Would you look at Defendant's Exhibit 4, and except for the articles and the person on here, does the photograph show the premises as they existed in December of 1965?

A. It does.

Q. Do you know the human being who is shown in this photograph?

A. Yes, I do.

Q. Who is that?

A. My grandbaby.

Mr. Eskridge: I offer into evidence Defendant's Exhibit 4.

Mr. McDonnell: May I view this for a few seconds, your Honor?

The Court: Certainly.

Mr. McDonnell: Would counsel identify this again, sir? I don't remember what this was.

The Court: Read counsel's question, please, Miss Reporter, and the answer seeking to have the exhibit identified.

(Record read by the reporter.)

Mr. McDonnell: I object to it, your Honor.

[522] The Court: I sustain the objection.

Mr. Eskridge: I don't believe I understand the objection, your Honor.

The Court: See a lawyer, Mr. Eskridge. I can't—all I can do is take them as I understand them.

Mr. Eskridge: But your Honor hasn't seen the exhibit.

The Court: Well, I have heard the question. I think the question is objectionable, no matter what the exhibit is.

By Mr. Eskridge:

Q. I show you Defendant's Exhibit No. 5 for identification and ask you to look at it, and except for the articles of furniture that you see thereon, does the photograph show the premises as they existed in December of 1965?

Mr. McDonnell: Objection.

The Court: I sustain the objection.

By Mr. Eskridge:

Q. I show you Defendant's Exhibits Nos. 6 through 15 and I ask you, except for the items of personal property, furniture that you see thereon, and persons that appear [523] thereon, do the photographs truly portray the premises as they existed in December of 1965?

Mr. McDonnell: Objection, your Honor.

The Court. I will sustain the objection.

By Mr. Eskridge:

Q. Now, Mrs. Jackson, would you tell us what furniture or kitchen appliances were in the kitchen of 6141 Drexel in 1961, large appliances?

A. Large appliances, a stove and two refrigerators.

Mr. McDonnell: I object, your Honor.

The Court: I sustain the objection. I think you are going back too far, Mr. Eskridge.

Mr. Eskridge: These events took place in December, 1965, your Honor.

The Court: You said '61, didn't you?

Mr. Eskridge: I said '65.

Mr. McDonnell: I am sorry, Judge. I thought I heard '61.

The Court: What does the reporter have?

The Reporter: '61.

The Court: You have got three against you, Mr. Esk-
[524] ridge. I sustain the objection. Three to one, that's pretty good.

By Mr. Eskridge:

Q. In December, 1965, would you describe for us the large appliances that were in the kitchen?

A. Well, there was two refrigerators there and a stove.

Mr. McDonnell: Objection to this unless he specifies—Well, I will withdraw the objection, your Honor.

The Court: You may tell.

Mr. Eskridge: In the kitchen now.

By the Witness:

A. Two large refrigerators and a gas stove.

By Mr. Eskridge:

Q. Will you tell us on which of the walls were these refrigerators?

A. I had one to the right of me on the wall——

Q. To the right of you, you mean as you enter the kitchen?

A. As you entered into the kitchen on the right wall was a refrigerator and to the back wall I had the large one setting there.

[525] Q. How close was this refrigerator to the pantry as you have described it?

A. Well, the pantry door set right by the smaller refrigerator.

Q. How much distance was there from the refrigerator to the pantry door?

A. Not too much distance there.

Q. Can you measure it in inches or feet?
A. There wasn't too much inches, too many inches, because it was right close together, the door was right along here and the refrigerator set right by the door.
Q. You can't measure it in inches?
A. No. Perhaps maybe an inch or two.
Q. Would you tell us how tall this refrigerator was?
A. It is around about five feet.
Q. Which way did that pantry door open?
A. Out, it just open up, the door.
Q. As you faced that pantry door, were the hinges on your left or on your right?

Mr. McDonnell: Judge, I am going to have to object to the leading question.
The Court: Yes. I will sustain the objection.

[526] By Mr. Eskridge:

Q. As you faced that door, on which side of the door were the hinges?
A. To the right.

Mr. Eskridge: Your witness.
The Court: Is there any cross examination of this witness?
Mr. McDonnell: Yes, Judge. Just a few short questions.
The Court: Take your time. They needn't be short. Take as long as you like. I just wanted to know if there was any.
Mr. McDonnell: Yes, sir.

Cross-examination.

By Mr. McDonnell:

Q. Mrs. Jackson, do you know Agent Charles Kerstann?
A. No, I don't.
Q. Do you know any Federal Bureau of Narcotic Agents?
A. No.
Q. Have you ever talked to any Federal Bureau of Nar-
[527] cotic agent?

A. I have talked to one at one time, but to know him again, if I would see him, I wouldn't.
Q. You wouldn't know him again, is that right?
A. That is right.
Q. But you talked to him in person?
A. Yes, just one, yes.
Q. Was he a Negro man or a white man?
A. He was a white man.
Q. What did he ask you?
A. He was asking me——

Mr. Eskridge: Objection. Fix the time and place.
Mr. McDonnell: I don't know when.

By Mr. McDonnell:

Q. When did you talk to this agent?
A. I don't know the exact date.
Q. Do you know the year?
A. It was in '66.
Q. Was there snow on the ground?
A. No, there was no snow on the ground.
Q. Well, was it warm outside, ma'am?
A. Well, it was perhaps maybe in the fall.
[528] Q. Did he ask you where your husband was?
A. He did.

Mr. Eskridge: Objection.
I am sorry, I withdraw the objection.

By Mr. McDonnell:

Q. Did he ask you where your husband was?
A. Yes.
Q. Did you tell him?
A. As far as I know, I did.
Q. You didn't know where your husband was, did you?
A. No.

The Court: What did you say to the agent? What did you say to him?
The Witness: I told him that I didn't know.

The Court: You didn't know where he was?
The Witness: I didn't.

By Mr. McDonnell:

Q. How many times did you tell that same agent that?
A. Oh, I only talked to him perhaps the one time in person.
[529] Q. How many times did you talk to him on the telephone?
A. I think he called my job one time.
Q. When was that?
A. I don't know exactly the date that he called.
Q. Was it within the last two weeks?
A. Oh, I just received a telephone call here Friday, but I didn't talk to anyone.
Q. Do you know who it was that called, or did anybody tell you?
A. No, all they say was there was an agent on there, but I didn't talk to no agent.
Q. Didn't you talk to him about two weeks ago, Mrs. Jackson?
A. No, I didn't.
Q. Mrs. Jackson, who pays the rent for you at your new address?
A. I did.
Q. Is that the Blackstone address?
A. Yes.
Q. Do you know the defendant James A. White?
A. Yes, I do.
Q. You have seen him often, haven't you?
[530] A. Sure, I have.
Q. He used to come to your house, didn't he, down at 6141 South Drexel?
A. Why, sure.
Q. He is a friend of yours, isn't he?
A. Sure, he's a friend of my husband.
Q. He was a friend of your husband, too, wasn't he?
A. That's right.
Q. Now you say your husband was out of town one or two months since December 1965 until the present date, is that correct?

A. Well, I figured mostly that he was out of town because my husband—in a way, my husband he gambles a lot and then he was away from home a lot, he don't be home all the time no way.

Q. He hasn't been home for a long time, has he?

A. Not for years, he don't stay home. I don't know where he is. I don't check in behind him.

• • • • •

[582] The Court: Is there anything further in behalf of the defendant?

Mr. Eskridge: Yes, your Honor, I would like at this time to reoffer or offer again Defendant's Exhibits Nos. 1 through 15, excepting No. 3 which is admitted into evidence, for the purpose of showing——

Mr. O'Donnell: Objection.

The Court: Let him make his offer.

Mr. Eskridge: —for the purpose of showing the physical layout of the premises at 6141 Drexel Boulevard.

Mr. McDonnell: Objection.

The Court: I will let you argue in support of your reoffer. You haven't added anything to what you said at the time they were offered originally. If you have anything additional to say, I will hear you, Mr. Eskridge.

Mr. Eskridge: Now the photographs were taken last week, November 17, 1966. Mary Jackson identified the premises and she testified that this is the way the premises [583] looked in December of 1965. There are on two photographs two faces of persons—persons whose faces show on the photographs. On some of these photographs there are items of furniture. The purpose of the introduction of the evidence is to show the physical layout of the premises, the walls and the doors and the testimony is that this is the way the physical layout of the premises was in December of 1965.

The Court: In order that the record may be complete, Mr. McDonnell, you may reply.

Mr. McDonnell: I have nothing to say other than what I said yesterday, Judge.

I object to them and make the same objections as I made yesterday.

The Court: The renewed offer of Defendant's Exhibits 1 through 15, excluding Exhibit No. 3 which has been admitted into evidence, will be denied and the objections thereto sustained.

Mr. Eskridge: The defendant rests.

Defendant rests.

The Court: Is there any rebuttal?

Mr. McDonnell: The government rests in rebuttal.

Government rests.

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

SEPTEMBER TERM, 1967—JANUARY SESSION, 1968

Nos. 16021-16022

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*

v.

JAMES A. WHITE, *Defendant-Appellant.*

March 18, 1968

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

Before *Senior Circuit Judge* MAJOR, SCHNACKENBERG and CASTLE, *Circuit Judges.*

SCHNACKENBERG, *Circuit Judge.* James A. White, defendant, appeals from a judgment following trial by jury, adjudging him guilty of violating 26 U.S.C. § 4705 (a) and 21 U.S.C. § 174. According to his counsel's brief, defendant was sentenced to a total imprisonment of 25 years and to pay a total of $35,000 in fines.

Foremost among errors relied upon are those said to arise out of interceptions of telephone and radio transmissions and the surreptitious placing of a radio transmitter on the person of a government informer during the time that he was conversing with defendant in various locations.

The government's evidence tended to prove the following events which are typical of other episodes not set forth herein.

On December 9, 1965, Harvey Jackson, a government informer, met defendant in the kitchen of the inform-

er's home. He had concealed on his person a Kel radio transmitter. While narcotics agent Carl Jackson was concealed in a kitchen closet, he overheard a conversation between Harvey Jackson and defendant, and observed defendant give a package to Harvey. The package contained heroin. The closet had two doors which the agent left ajar so that he could see defendant and the informer, who asked the number of ounces in the package, and defendant said "one good ounce". Defendant added that he would come the next day for the money. Narcotics agent DeFauw overheard this conversation through a receiver.

The next day agent Jackson was again in the closet, from which he observed Harvey and defendant count $1,000, in official funds previously given Harvey by agent DeFauw, which defendant put in his pocket. Agent Jackson also heard defendant tell the informer he would get more "stuff" on December 24 and arrange to meet the informer at 6 p.m. the next day at Lake and Wells streets for further payment. DeFauw overheard that conversation by receiving radio transmissions from a Kel transmitter previously concealed on the informer's person.

On December 14, 1965, DeFauw placed the Kel set on the informer's person, furnished him with $360 and followed him to the residence of defendant. DeFauw overheard by radio receiver a conversation between defendant and the informer, in defendant's house, in which the money was counted and arrangements made for defendant to sell the informer another two ounces of "stuff" on December 16, for $1250, with payment due within a week and a half after delivery. Defendant said he wanted the money faster, as the "Dagoes" wanted their money sooner. Arrangements were made to meet at 6 o'clock on December 16.

On December 16, 1965, DeFauw placed the Kel set

under the informer's clothing and followed him to Clark and Wacker streets, where the informer Jackson met defendant, who entered informer's car. Agent DeFauw, following them in his car, overheard their conversation about the price and quality of heroin by radio receiver. Thereafter the informer left the car, as defendant said he had to meet "this man". Defendant drove the car to State and Randolph streets, where he picked up Sam Minerva, who rode for one-half block. From State and Randolph streets, agent Kerstann followed defendant to Lake and Wells streets, where the informer re-entered his own car. Kerstann by radio receiver overheard defendant say he had met "this man" and would leave the package on the seat. Defendant left the car. Kerstann entered the informer's car and the informer pointed to a package which contained heroin.

On December 28, 1965, DeFauw again placed the Kel set under the informer's clothes and gave him $1250. DeFauw followed agent Jackson and the informer to the latter's residence where *agent Jackson concealed himself in the closet. Defendent later arrived and asked if the informer had the money and they counted out $1250. The informer asked for more "stuff" and defendant said he could get some the next day, but he had to have the money faster as the Dago wanted fast delivery of money.*

From the closet agent Jackson overheard this conversation and observed the transfer of money. Agent DeFauw listened by radio receiver.[1]

On December 29, 1965, agents Connolly and Lewis followed defendant from his residence and into a tavern at 225 North Clark Street, where defendant talked

[1] The foregoing italicized language is taken from the statement of facts, which the evidence tended to prove, included in the brief filed by appellant.

briefly to Harry B. Williams. Connolly saw him go to a nearby Hyman's Clothing Store. Williams then left. Defendant, observed by agents, left Hyman's and drove to State and Randolph Streets where he picked up Minerva who rode for one-half block. Minerva was carrying a white shoe box. When he left the car he was carrying a black brief case. One block later defendant picked up Williams. Meanwhile the informer, equipped with a Kel transmitter, had entered said tavern. Defendant and Williams returned to the tavern. Defendant entered, Williams remaining in the car. Defendant talked to the informer and drove to Lake and Wells Streets. The informer followed. Defendant walked to the informer's car and handed him a sack. Over the radio, Meyer heard defendant ask the informer to take Williams south to Kimbark Avenue and Midway Plaisance. The informer did so. Williams was also carrying a brown paper bag. At 62nd Street and Drexel Avenue the informer gave agent DeFauw a brown paper sack. It contained heroin.

On January 5, 1966, DeFauw placed the Kel set on the informer and give him $1300. Agent Jackson concealed himself in the kitchen closet of the informer's home. He observed defendant and informer count the money. Defendant told the informer to bring the "remaining $950" to his restaurant, the Dining Room Aluminer. DeFauw heard the conversation by Kel receiver. Defendant wanted the informer to purchase large sums of heroin and to pay in advance.

On January 7, 1966, the informer was in company with agents DeFauw and Kerstann at 59th Street and Stony Island Avenue. DeFauw placed the Kel set on the informer, gave him $950 and followed him to defendant's restaurant which the informer entered. DeFauw heard over his receiver defendant tell the informer that the price of heroin was going up, and to

meet him at Lake and Wells and defendant would get three "things" for $2500.[2]

On January 8, 1966, at 6 p.m. DeFauw saw Minerva standing at State and Randolph Streets. Defendant drove up, stopped, opened the door, and Minerva approached the car. Defendent said "come on, man, give me the package, I've got to get out of here." Minerva handed a brown leather briefcase into the car and said he would pick up the money later. DeFauw placed defendant under arrest and seized the briefcase. It contained heroin.

Early in the trial, when agent Jackson testified that he listened in on a telephone conversation between the informer and defendant, objection by the defense was made on the ground that such interception was a violation of the law of Illinois, as well as the federal constitution and law, but the objection was overruled.

Also the defense objected when DeFauw testified about receiving radio transmissions from the transmitter concealed on the person of the informer. The objection was overruled. At the conclusion of the government's case, a motion by the defense to strike various radio conversations and transmissions to which the various agents testified, on the ground that they were in violation of the Illinois Eavesdropping Statute, and the state's public policy, as well as the fourth and fifth amendments to the federal constitution, was denied by the court.

1. Defendant was convicted of the possession and sale of narcotics largely as a result of the testimony of federal narcotics agents that they heard defendant make self-incriminating statements, which had been transmitted over the air by an electronic device hidden under the informer's clothes. Thereby the agents

[2] Witness DeFauw was given his report to refresh his recollection. The record shows that this report was given to defense counsel when he started a cross-examination of DeFauw.

heard conversations taking place in defendant's home, his car, his place of business, as well as in the informant's house and car. The evidence clearly shows that by these means government agents were able to, and did, testify to what they thus heard, including admissions by defendant. Informer Jackson did not testify at the trial. There is no contention that the government relied on any warrant or court order.

In *Katz* v. *United States,* 389 U.S. 347 (1967), the Supreme Court reversed a conviction obtained after a trial during which the government had introduced defendant's telephone conversation overheard by federal agents through a device they had attached to the outside of a public telephone booth. In the absence of a proper warrant or judicial order, surveillance was held to be "per se unreasonable under the fourth amendment" even though the F.B.I. investigation activities established "a strong probability" that defendant was violating federal law.

The importance of the *Katz* holding we pointed out in *United States* v. *Hagarty,* No. 15881 (January 11, 1968):

> "* * * Thus the Government first urges that Nasser's government office was not a constitutionally protected area. A similar argument with respect to the public telephone booth was rejected in *Katz,* where Mr. Justice Stewart pointed out that 'the Fourth Amendment protects people, not places,' and that what a person 'seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.' The key is whether defendant sought to exclude 'the uninvited ear.' Under this rationale, it is immaterial that the overheard conversation took place in an IRS office. The Fourth Amendment applies 'Wherever a man may be * * *.' 36 U.S. Law Week at 4081, 4083."

In the case at bar, the well-laid plans of the government agents were obviously made because the government recognized that defendant sought to exclude the "uninvited ear". For instance, why would it have hired informer Jackson, placed upon his person a hidden radio transmitter, and concealed agent Jackson in a kitchen closet of the home of the informer and thereby arranged to have a conversation between the informer Jackson and defendant overheard by agent Jackson?

By the particular means of surveillance used, it seems to us patent that the government recognized that defendant's rights under the fourth amendment, as declared in the rulings of the United States Supreme Court, had to be respected. We now apply the principles announced by the Supreme Court in its recent pronouncement in *Katz* to the situation here presented.

At 353, the court said:

> "* * * once it is recognized that the Fourth Amendment protects people—and not simply 'areas'—against unreasonable searches and seizures, it becomes clear that the reach of that Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure.
>
> "* * * The Government's activities in electronically listening to and recording the petitioner's words violated the privacy upon which he justifiably relied while using the telephone booth and thus constituted a 'search and seizure' within the meaning of the Fourth Amendment. * * *"

At 357, the court added:

> "* * * Searches conducted without warrants have been held unlawful 'notwithstanding facts unquestionably showing probable cause,' * * * and that searches conducted outside the judicial proc-

> ess, without prior approval by judge or magistrate are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.
>
> "* * * Even electronic surveillance substantially contemporaneous with an individual's arrest could hardly be deemed an 'incident' of that arrest. Nor could the use of electronic surveillance without prior authorization be justified on grounds of 'hot pursuit.' And, of course, the very nature of electronic surveillance precludes its use pursuant to the suspect's consent.
>
> "* * * And bypassing a neutral predetermination of the *scope* of a search leaves individuals secure from Fourth Amendment violations 'only in the discretion of the police.' * * *
>
> "These considerations do not vanish when the search in question is transferred from the setting of a home, an office, or a hotel room to that of a telephone booth. Wherever a man may be, he is entitled to know that he will remain free from unreasonable searches and seizures. The government agents here ignored 'the procedure of antecedent justification . . . that is central to the Fourth Amendment,' a procedure that we hold to be a constitutional precondition of the kind of electronic surveillance involved in this case. Because the surveillance here failed to meet that condition, and because it led to the petitioner's conviction, the judgment must be reversed."

This language, which is clear and convincing, is decisive here. In accordance with the ruling in *Katz,* we hold that the judgment from which this appeal was taken must be reversed.

2. In view of our disposition of this issue we find it unnecessary to consider other alleged trial errors cited by appellant.

Accordingly the judgment of the district court is reversed.

JUDGMENT REVERSED.

Nos. 16021 and 16022

CASTLE, *Circuit Judge,* dissenting. Unlike the situations presented in *Katz* v. *United States,* 389 U.S. 347, and *Berger* v. *New York,* 388 U.S. 41, there was no "eavesdropping" involved in the instant case. Here, one party to the conversations consented to their electronic recording and transmission. Although, like in *Hoffa* v. *United States,* 385 U.S. 293 and *Lewis* v. *United States,* 385 U.S. 206, such activity constituted a betrayal of the defendant's confidence, he did intend the informer to hear what he was told. And, that the informer breached the confidence the defendant reposed in him by recording and transmitting the conversations—or in permitting a government agent to overhear them—does not violate any constitutional right of the defendant.

In our recent decision in *United States* v. *Hagarty* (No. 15881, Opinion filed January 11, 1968) cited by the majority this Court pointed out that, "[n]either Hagarty nor Nasser had consented to the eavesdropping".

A true Copy:

Teste:

____, ____,

Clerk of the United States Court of Appeals for the Seventh Circuit.

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

SEPTEMBER TERM, 1968—SEPTEMBER SESSION, 1968

No. 16021-16022

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*

v.

JAMES A. WHITE, *Defendant-Appellant.*

January 7, 1969

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division. On rehearing en banc.

Before CASTLE, *Chief Judge,* MAJOR, *Senior Circuit Judge,* SCHNACKENBERG,[1] HASTINGS, KILEY, SWYGERT, FAIRCHILD, CUMMINGS, and KERNER, *Circuit Judges.*

SWYGERT, *Circuit Judge.* The defendant, James A. White, was tried before a jury and convicted on seven counts of two consolidated indictments which charged him with certain narcotics violations arising under the provisions of 26 U.S.C. § 4705(a) and 21 U.S.C. § 174. The district court imposed a prison sentence of twenty-five years and fined the defendant $35,000.

A three-judge panel of this court, one judge dissenting, reversed the judgment of conviction. Subsequently, the Government's petition for a rehearing en banc was

[1] Although Judge Schnackenberg participated in the en banc rehearing, he died prior to the adoption of this opinion. As author of the prior panel decision of this court, he was of the view that the rationale of *Katz* v. *United States,* 389 U.S. 347 (1967) required reversal of White's conviction.

granted. Upon consideration of this cause by the entire court, we are of the opinion that our prior decision should be followed and that the district court's judgment of conviction must be reversed and the case remanded for a new trial.

The principal error relied upon by the defendant and the one which controls our disposition of this appeal was the admission into evidence of certain incriminating statements made by the defendant which were overheard by means of electronic eavesdropping by Government agents. This eavesdropping was accomplished by the placing of a radio kel set transmitter [2] on the person of a Government informer, Harvey Jackson, before he talked with White at various locations, including the defendant's home, automobile, and place of business, as well as the informer's home. At no time did the agents of the Federal Bureau of Narcotics secure a search warrant or court order authorizing such eavesdropping.

The Government's evidence tended to prove the following facts. On December 9, 1965, Harvey Jackson, the informer, who did not testify at trial, met defendant White in the kitchen of the informer's Chicago home. The informer had concealed on his person a kel set transmitter and had allowed a narcotics agent, Carl Jackson, to hide himself in a closet adjacent to the kitchen. While agent Jackson was so concealed, he overheard a conversation between informer Jackson and White and observed White transfer a package to the informer. This package, according to subsequent tests, contained heroin. From inside the closet where he could see White and the informer through the slightly open doors, agent Jackson overheard the informer inquire how many ounces there were in the package; the defendant responded, "one good ounce." After asserting

[2] A radio kel set is a small transistorized device which transmits voices or sound which can be picked up on receiving units.

that he would return the following day for payment, the defendant left the informer's home. Narcotics agent Robert DeFauw who was situated in an automobile outside the informer's home overheard the entire conversation on a radio which received transmissions from the informer's kel set.

On December 10, 1965 the informer called White from a public telephone and arranged an appointment for that day at the informer's home so that payment for a prior narcotics transfer could be made. Agent Jackson, with the informer's permission, overheard this conversation on the same telephone receiver used by the informer. Agent Jackson and the informer then went to the latter's home, where agent Jackson again concealed himself in the closet and observed the informer and White count $1,000 in official funds, previously given the informer by agent DeFauw. White put the money in his pocket, told the informer that he would get more "stuff" on December 14, and requested the informer to meet him at 6 p.m. the next day on a specified Chicago street corner for further payment. Again agent DeFauw overheard the entire conversation in his car outside the informer's home by receiving radio transmissions from the kel set which had been previously concealed on the informer's person.

On December 14, 1965 agent DeFauw placed a kel set on the informer's body, furnished him with $360, and followed him to the defendant's residence. A conversation between the defendant and the informer which took place inside the defendant's home was overheard on a radio receiver by agent DeFauw at his position outside White's home. During the course of this monitored conversation, money was counted and arrangements were made for the defendant to sell an additional two ounces of "stuff" on December 16 for $1,250, with payment due within a week and a half after delivery. The de-

fendant requested faster payment since his suppliers wanted their money sooner and arrangements were made to meet again at 6 p.m. on December 16.

On December 16, 1965 agent DeFauw placed a kel set under the informer's clothing and followed him to a Chicago intersection where the informer met White who entered the informer's car. While White and the informer drove around the city for two hours, agent DeFauw, following them in his car, overheard by radio receiver their conversation concerning the price and quality of heroin. Thereafter the informer left the car because White said he had to meet "this man." White drove the car a few blocks to another Chicago intersection where he picked up Sam Minerva, a supplier of narcotics. At this point agent William Kerstann who was trailing White, observed Minerva emerge from the car after riding a short distance. Kerstann followed White a couple of blocks to a street corner where the informer re-entered the car. By radio receiver, Kerstann overheard the defendant say that he had met a certain man and received a package which he would leave on the seat of the informer's car. Then White said he had to leave the informer in order to meet another man. After White's departure, agent Kerstann entered the car and seized the package containing heroin.

On December 28, 1965 the informer was given $1,250 and a kel set was placed under his clothes. While followed by agent DeFauw, agent Jackson and the informer drove to the latter's residence, where agent Jackson resumed his usual surveillance position in the kitchen closet. Jackson saw the defendant enter the kitchen, sit down at a table, and join the informer in counting the $1,250. When the informer requested more heroin. White advised him that more would be forthcoming the following day, but that payment would have to be made

more quickly because the supplier "wanted his money." Agent Jackson overheard the conversation from the closet and agent DeFauw listened on a radio receiver from his position in a car outside the informer's residence.

On the following day, agents David Connolly and Arthur Lewis followed White from his residence to a tavern where he talked briefly to Harry D. Williams, another narcotics peddler, and then departed. After stopping at a clothing store, White drove to a Chicago intersection where he picked up Minerva who accompanied White for one-half block. Although Minerva was carrying a white shoe box when he entered White's car, he left with a black briefcase. White drove a block, picked up Williams, and returned to the tavern where they had talked earlier the same day. Meanwhile the informer, equipped with a kel set, had entered the same tavern. While Williams remained in the car, White went into the tavern and talked with the informer. They left and drove a few blocks in separate cars to a point where the defendant stopped, got out of his car, walked to the informer's car, and handed him a sack. Agent Vernon Meyer, who had been surveilling the informer's activities, heard over a radio in his car the defendant ask the informer to take Williams to the city's south side. Williams, also carrying a brown paper sack, entered the informer's car and drove with him to their appointed destination. After discharging Williams, the informer met agent DeFauw and gave him the paper sack which contained heroin.

On January 5, 1966 agent DeFauw placed a kel set on the informer and gave him $1,300. From the closet in the informer's kitchen where he was secreted, agent Jackson observed the defendant and the informer count the money. The defendant told the informer to bring the "remaining $950" to the Dining Room Aluminer, a restaurant operated by White. White also requested

that the informer purchase a large amount of heroin and pay in advance. The entire conversation was heard by agent DeFauw over the radio in his car.

Two days later, the informer was given $950 and had a kel set placed on his person by agent DeFauw. The agent followed the informer to White's Dining Room Aluminer which the informant entered. From his automobile, agent DeFauw heard over his radio the defendant tell the informer that the price of heroin was going up and that he should meet White at a Chicago intersection where a $2,500 heroin delivery would be made.

On January 8, 1966 agent DeFauw saw Minerva standing at a city bus stop. The defendant drove up, stopped, opened the door, and Minera approached the car. White said, "Come on, man, give me the package, I've got to get out of here." Minerva handed a brown leather briefcase into the car and said that he would pick up the money later. Agent DeFauw placed the defendant White under arrest and seized the briefcase containing heroin.

The Government's evidence was based largely upon oral testimony by the narcotics agents that they overheard incriminating statements made by White to the secret informer, Harvey Jackson, and transmitted by the kel set device. As we have heretofore stated, these transmitted conversations occurred in the defendant's home, automobile and place of business as well as in the informer's automobile and home.[3] The defense objected when agent DeFauw and other agents testified concerning White's incriminating statements transmitted from

[3] There can be no doubt that these may be constitutionally protected areas. "Wherever a man may be, he is entitled to know that he will remain free from unreasonable searches and seizures." *United States.* v. *Katz*, 389 U.S. at 359. *See also, United States* v. *Hagarty*, 388 F. 2d 713 (7th Cir. 1968); *Lanza* v. *New York*, 370 U.S. 139 (1962) (jail visiting room not a protected area). It is not the area alone, but the relationship between the area and the person protected that is critical.

the kel set concealed on the informer's body. The objection was overruled. A motion by the defense made at the conclusion of the Government's case to strike the conversations to which the various agents testified on the ground that they were in violation of the fourth and fifth amendments was denied by the court.

The central issue presented is whether defendant White's fourth amendment rights, protecting him against governmental intrusion by unreasonable search and seizure, were infringed when the Government narcotics agents electronically intercepted his private conversations.

To decide the constitutionality of the Government's surreptitious overhearing of White's conversations, we apply the criteria recently set forth in *Katz* v. *United States,* 389 U.S. 347 (1967). The facts of *Katz* were that Federal Bureau of Investigation agents, having probable cause and acting in a carefully controlled manner but without prior judicial approval, placed an electronic listening and recording device outside a public telephone booth and intercepted telephone conversations which the defendant made from the booth to others without the knowledge or consent of the defendant or any of the other parties to the conversations. In reversing the defendant's conviction, the Supreme Court held that the admission of these conversations as evidence, covertly obtained by electronic surveillance, was improper because they were seized in violation of the defendant's fourth amendment rights. Essentially, the Supreme Court's determination was grounded on the lack of prior judicial authorization, because no search warrant had been obtained, and the fact that under the circumstances antecedent justification before a magistrate was essential to insure the defendant's fourth amendment guarantees.

The *Katz* opinion stated that the fourth amendment is designed to preserve privacy against the "uninvited

ear" of governmental intrusion and must be applied to "protect people, not places."[4] The trespass doctrine, suggested earlier in *Olmstead* v. *United States,* 277 U.S. 438 (1928), and *Goldman* v. *United States,* 316 U.S. 129 (1942), and which provided the basis for prior Supreme Court decisions in this area, such as *On Lee* v. *United States,* 343 U.S. 747 (1952), was squarely discarded by the Court in *Katz:* "[T]he underpinnings of *Olmstead* and *Goldman* have been so eroded by our subsequent decisions that the 'trespass' doctrine there enunciated can no longer be regarded as controlling." 389 U.S. at 353.

The *Katz* case further indicates that conversations are within the scope of the fourth amendment's protection: "[T]he Fourth Amendment governs not only the seizure of tangible items, but extends as well to the recording of oral statements, overheard without any 'technical trespass . . . under local property law.' *Silverman* v. *United States,* 365 U.S. 505, 511." 389 U.S. at 353. Consequently, White's covertly overheard statements are within the scope of the fourth amendment's guarantees.

The Government urges us to disregard the *Katz* rationale because of certain factual differences. Although we recognize these factual differences, we believe them to be without legal significance. It is true that the *Katz* case involved governmental interception of a conversation without the consent or knowledge of either party, whereas in the present case one party to the monitored conversation, informer Jackson, was cognizant of the Government's eavesdropping activities.

It is our opinion, however, that the surreptitious

---

[4] The relationship between eavesdropping and the right to privacy has been the source of continuing judicial concern. Wiretapping and other forms of eavesdropping are recognized by even their most zealous advocates as encroachments on a man's right to privacy, characterized by Justice Brandeis as "the most comprehensive of rights and the right most valued by civilized men." *Olmstead* v. *United States,* 277 U.S. 438, 478 (1928) (dissenting opinion).

placing of the kel set on informer Jackson was for all conceptual purposes the same as the surreptitious wiring of the telephone booth in *Katz*. Each act was part of a "bugging" technique by which a conversation was transmitted to an "uninvited ear"—government agents. The crucial fact in each case is that the respective speakers did not consent to the overhearing of their statements and that the conversations were overheard by third persons uninvited by the speaker.

To claim, as the Government does, that one party can waive the fourth amendment rights of another is the same thing as saying that *Katz* would have been decided differently if the recipient of the intercepted phone call had consented to the Government's bugging. We are unable to believe that such a meaningless form of consent would have rendered the defendant's overheard statements any more admissible in *Katz*. Since we think no distinction of constitutional significance can be drawn between the third party overhearing presented in *Katz* and the consensual monitoring here, the fact of listener consent is without decisional significance and cannot operate as a waiver of any speaker's fourth amendment rights.[5]

The content of the defendant's private conversations, intercepted by the Government's clandestine activity and without prior judicial control, must be held as per se inadmissible evidence if the language of *Katz* is literally applied:

---

[5] In holding that the rationale of *Katz* applies regardless of whether one party to a private conversation consents to the Government's interception of the conversation, we do not purport to make any determination regarding the voluntariness of informer Jackson's participation in the agents' scheme. Since it is our view that a listener's consent is irrelevant, it is difficult to see how informer Jackson's conduct, whether the product of coercion or consent, could have constituted a waiver of the defendant's constitutional rights. Only his own consent could have created such a waiver. The rationale of *Katz* permits no other conclusion.

Searches conducted without warrants have been held unlawful "notwithstanding facts questionably showing probable cause," *Agnello* v. *United States,* 269 U.S. 20, 33, for the Constitution required "that the deliberate, impartial judgment of a judicial officer . . . be interposed between the citizen and the police. . . ." *Wong Sun* v. *United States,* 371 U.S. 471, 481-82. "Over and again this Court has emphasized that the mandate of the [Fourth] Amendment requires adherence to judicial processes," *United States* v. *Jeffers,* 342 U.S. 48, 51, and that searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment —subject only to a few specifically established and well-delineated exceptions.[6] *Katz* v. *United States,* 389 U.S. at 357 [footnotes omitted].

It is especially important that the Court in *Katz* referred with approval to *Osborn* v. *United States,* 385 U.S. 323 (1966), where the essentiality of prior authorization was emphasized. In *Osborn* a paid informer recorded conversations between himself and the defendant in order to corroborate his sworn statement that the defendant was attempting to employ him to bribe a prospective juror. *Osborn* teaches what the agents in

[6] These exceptions permit a warrantless search whenever the burden of obtaining a warrant would be likely to frustrate the purpose of the search. *See, e.g., Camara* v. *Municipal Court,* 387 U.S. 523, 533 (1967). Thus, the Court has allowed a warrantless search of an automobile on the ground that it might leave the jurisdiction before a warrant could be obtained, *Carroll* v. *United States,* 267 U.S. 132 (1925), and has approved taking a blood sample without first securing a warrant as necessary to prevent dissipation of the blood's alcoholic content, *Schmerber* v. *California,* 384 U.S. 757 (1966). In the present case, the Government did not argue that the evidence would have been lost due to the delay of obtaining a warrant, nor do the facts suggest that such an argument could have been made.

the instant case should have done, but failed to do, namely, obtain a warrant authorizing the use of electronic surveillance devices.

The exceptions to the warrant rule of *Osborn* and *Katz* which are explicitly mentioned in the *Katz* opinion do not have application to the governmental eavesdropping endeavors presented by the present case. In fact, our conclusion that the agents' testimony relating to the transmitted statements of the defendant which they overheard is inadmissible is strengthened by the Supreme Court's unequivocal language which clearly precludes the existence of any fourth amendment exception for consensual surveillance. "And, of course, the very nature of electronic surveillance *precludes* its use pursuant to the suspect's consent." *Katz* v. *United States,* 389 U.S. at 358 (emphasis added). Thus the literal language of *Katz* as applied to the case before us would require reversal since White did not consent to the eavesdropping and no antecedent justification was sought.

Our view as to the result which must be reached upon the application of the *Katz* principles is reinforced by our understanding of the fourth amendment. That amendment's search and seizure protection is lost to a person when his actions as a matter of law can be said to constitute a waiver of his right. Since the fourth amendment protects a speaker's right to privacy, this right would be illusory if it could be waived by other individuals.

The decisions provide a catalogue of instances where a speaker's behavior is such that a waiver of his fourth amendment rights has occurred as a matter of law. For example, *Hoffa* v. *United States,* 385 U.S. 293 (1966), is based on the unarticulated rationale that when one speaks he takes the risk that his intended listener may subsequently testify as to the contents of the conversa-

tion. Such a risk, although perhaps the product of a "misplaced confidence," is reasonably foreseeable, and thus objection thereto is waived. Another risk taken by a speaker is outlined in *Rathbun* v. *United States,* 355 U.S. 107 (1957).[7] In that case, the Court determined that on a constructive knowledge theory it is not unreasonable to say that one who places a telephone call takes the risk that an extension on the other end of the line may be picked up by an uninvited third party with or without the complicity of the intended listener.[8] The focal point in determining the existence of a speaker's fourth amendment rights must be whether his activity was directed at keeping his statements private and what were the risks of overhearing which he should have justifiably anticipated at the time of his statements.[9] In deciding whether the defendant waived his fourth

[7] To the extent that *Rathbun* is based on the one party consent theory, it is inconsistent with the broad ruling of *Katz.* We view it from the speaker risk point of view for purposes of our present discussion.

[8] It is important for courts deciding fourth amendment questions to take into account the relationship between that amendment and the first amendment's penumbral protection of privacy. It is this nexus which makes a speaker risk analysis appropriate. If the law places great risks of governmental intrusion on an individual's activity, especially his private speech, he will be inhibited in the free exercise of his first amendment rights, that is, the broader the scope of governmental searches and seizures which are determined to be consistent with the fourth amendment, the narrower the ambit of protected first amendment activity will become. This important interrelationship is detailed in GREENAWALT, *The Consent Problem in Wiretapping & Eavesdropping: Surreptitious Monitoring with the Consent of a Participant in a Conversation,* 68 COLUM. L. REV. 189 (1968).

[9] This court, speaking through Judge Hastings, recently recognized a substantially similar inquiry: "One who intends a conversation or transaction to be private and takes reasonable steps to keep it private is protected from government intrusion unauthorized by warrant or well-defined special circumstances." *United States* v. *Haden,* 397 F.2d 460, 465 (7th Cir. 1968).

amendment rights, we are mindful of the Supreme Court's admonition in *Johnson* v. *Zerbst,* 304 U.S. 458, 464 (1938): "[C]ourts [should] indulge every reasonable presumption against waiver of fundamental constitutional rights and . . . we 'do not presume acquiescence in the loss of fundamental rights.' "

Nonetheless, the Government, relying upon the following statement from *Katz,* attempts to distinguish that opinion from the facts before us, "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." *United States* v. *Katz,* 389 U.S. at 351. To ascertain the applicability of that formulation, we must address ourselves to the questions of whether the Government's activities violated a justifiable expectation of privacy which the defendant held and whether he acted in such a manner as to knowingly expose his statements and thus waive his rights.[10] A realistic appraisal of the defendant's conduct permits no other conclusion than that he justifiably expected his conversations to be private.[11] The well-laid plans of the Govern-

---

[10] Other tests have been suggested to determine the precise contours of the fourth amendment's protection. As articulated in his concurring opinion in *Katz,* Justice Harlan sets up a twofold requirement: "[f]irst that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.' " 389 U.S. at 361 (concurring opinion).

[11] The justifiable expectation of privacy is a conclusion which must be drawn only after an examination of all the circumstances surrounding the context in which the asserted right arises; one of these circumstances is the place which the individual has attempted to appropriate to his personal use in asserting his claim to privacy. This was illustrated in another search and seizure case decided after *Katz, Mancusi* v. *DeForte,* 392 U.S. 364 (1968). In deciding that a union official has standing to object to seizure of union records from an office he shares with other officials, the Court phrased the relevant question as whether the defendant while occupying such a place could justifiably expect freedom from governmental intrusion.

ment agents were made because they recognized that the defendant sought to exclude their uninvited ears. Why else would they have hired informer Jackson, placed upon his person a hidden radio transmitter, and concealed agent Jackson in the informer's kitchen closet to overhear the defendant's conversation? Additionally, the locations chosen for the private conversations indicate that the defendant took reasonable steps to protect against governmental intrusion. In such a situation we can only conclude that the defendant's fourth amendment rights were violated,[12] that the failure to suppress the evidence of his statement was error, and that their admission at trial constituted ground for reversal.[13]

Although the Government has cited numerous cases to support its position, they are inapposite. Unlike the case before us, *Hoffa* v. *United States,* 385 U.S. 293 (1966), and *Lewis* v. *United States,* 385 U.S. 206 (1966), presented situations where there was no electronic interception or transmission of the defendants' statements. They stand for the proposition that an in-

---

[12] According to the language in *Katz*, "[T]he Government's activities in electronically listening to and recording the petitioner's words violated the privacy upon which he justifiably relied . . . and thus constituted a "search and seizure' within the meaning of the Fourth Amendment." *Id.* at 353. The assessment made by the Court regarding *Katz* is equally applicable to the defendant White: "[He] surely is entitled to assume that the words he utters . . . will not be broadcast to the world." *Id.* at 352.

[13] Other courts have reached an identical conclusion in light of the *Katz* decision. *E.g., Doty* v. *United States* F.2d , 3 Crim.L.R. 2220 (10th Cir. 1968), decision on rehearing pending; *United States* v. *Jones,* F.Supp. , 3 Crim.L.R. 3007 (D.D.C. 1968). *Contra, Dancy* v. *United States,* 390 F.2d 370 (5th Cir. 1968) (Fahy, J., sitting by designation from the D.C. Cir., dissenting). Other circuits which have faced the issue here presented such as the Second Circuit in *United States* v. *Jackson,* 390 F.2d 317 (2d Cir. 1968), and the Ninth Circuit in *Jack* v. *United States,* 387 F.2d 471 (9th Cir. 1967), voiced their opinion before the Supreme Court's adjudication of *Katz*.

former is a competent witness as to conversations and dealings with a defendant. Looked at from the viewpoint of the speaker, these cases demonstrate that a person confiding in another takes the risk that the confidence may be misplaced and that the confidant may memorize or record the statements and repeat them at trial. That risk and the applicable rule provide no guidance for the present problem.

Likewise, *Rathbun* v. *United States,* 355 U.S. 107 (1957), a consensual overhearing case not decided on a constitutional basis, involved the assumption of a risk by the defendant that operated as a waiver of his fourth amendment protection. The holdings of *Rathbun* and this court's decision in *Williams* v. *United States,* 311 F.2d 721 (7th Cir.), *cert. denied,* 374 U.S. 812 (1963), do not settle the question before us and are of no benefit to the Government.

Lopez v. *United States,* 373 U.S. 427 (1963), has factual features which distinguish it from the instant case. In *Lopez* a concealed device on the person of an undercover agent recorded a conversation between him and the defendant. Admission in evidence of the recording itself to corroborate the undercover agent's testimony was upheld in the circumstances of the case. The important distinction between *Lopez* and this case is that here the informer, Harvey Jackson, was not produced as a witness whereas in *Lopez* the Government agent was a witness. *Lopez* goes no further than to hold that where an informer testifies as to conversations with a defendant, a recording of such conversations is admissible for the limited purpose of corroboration.

In *Osborn* v. *United States,* 385 U.S. 323 (1966), a Government informer recorded conversations between himself and the defendent for the purpose of corroborating his allegations that the defendant was endeavoring to employ him to bribe a prospective juror. Al-

though the case involved monitoring with the consent of the informer, there was proper judicial approval of the reasonableness of the recording.

The Goverment's principal reliance is placed on the decision in *On Lee* v. *United States,* 343 U.S. 747 (1952). There an electronic device which transmitted two conversations between an agent and the defendant, one of which took place in the defendant's laundry and the other a few days later on the street, was concealed on the body of an undercover agent. On each occasion the transmitted conversation was heard by a government agent stationed nearby with a receiving device. The agent's testimony as to what he had heard was held admissible over the defendant's contention that the informer was a trespasser and that hence the seizure was proscribed by the fourth amendment. On its facts, *On Lee* is directly in point and would control the disposition of this case if *Katz* had not supervened and if the Supreme Court had not on other occasions completely eroded the decisional basis of *On Lee.*

The recent treatment of the *On Lee* doctrine indicates that it now stands on unfirm ground. Not only did four members of the Supreme Court disagree with *On Lee* when it was decided, but also in *Lopez,* the majority pointed out that *On Lee* was of no help to the defendant. The Chief Justice, in his concurring opinion, was careful to make plain that he could not join in any implication that the majority was accepting the continued vitality of *On Lee.*[14]

---

[14] Chief Justice Warren said: "Since I agree with Mr. Justice Brennan that *On Lee* was wrongly decided and should not be revitalized, but base my views on grounds different from those stated in the dissent, I have chosen to concur specially." *United States* v. *Lopez,* 373 U.S. at 441.

Justice Brennan, joined by Justices Douglas and Goldberg, stated in dissent: "The Court's refusal to accord more than passing mention in its opinion to the only decision of this Court—*On Lee*

The most lethal blow to *On Lee* was dealt by the Court's overruling in *Katz* of the *Goldman* and *Olmstead* bulwark which had provided the conceptual basis for *On Lee*.[15] The overruling of these cases combined with the reasoning of *Katz* leaves no scope for *On Lee's* teaching. For these reasons, *On Lee* cannot be the foundation of our decision.

On the basis of the constitutional principles set forth in *Katz* and our understanding of the protection which the fourth amendment was drawn to provide, we are of the opinion that the surreptitious monitoring of the defendant's conversations was a naked violation of his rights and that the resultant seizure of his statements was not made in conformity with the provisions of that amendment.[16]

In view of our disposition of this issue we find it unnecessary to consider the other alleged errors presented by the defendant.

Accordingly, we adhere to our previous decision reversing the judgment of the district court and remand the case for a new trial.

CASTLE, *Chief Judge*, with whom Circuit Judges Hastings and Fairchild join, dissenting. I find myself unable to agree that the decisional basis of *On Lee* has

—factually analogous to the case at bar suggests very strongly that some of my colleagues who have joined the Court's opinion today agree with us that *On Lee* should be considered a dead letter. For the Court, rather than follow *On Lee*, has adopted the substance of the Government's attempted distinction between *On Lee* and the instant case." *Id.* at 447.

[15] For further discussion see p. 7, *supra*.

[16] The present decision overrules our prior determinations pertaining to the admissibility of statements seized in situations similar to those presented here. *E.g.*, *United States* v. *Pullings*, 321 F.2d 287, 295 (7th Cir. 1963), and *United States* v. *Vittoria*, 284 F.2d 451, 455 (7th Cir. 1960), wherein we held that by consent an individual can waive another party's fourth amendment rights.

been eroded to the extent that the electronic monitoring of the defendant's conversations with the informer, with the latter's consent, must now be regarded as constituting an unreasonable search and seizure in violation of the Fourth Amendment. The majority opinion recognizes that on its facts *On Lee* is directly in point and would control the disposition of this case unless its teaching is to be completely rejected. I join with Justice White in regarding *On Lee* as "undisturbed" by the decision in *Katz*. (Concurring opinion, *Katz* v. *United States*, 389 U.S. 347, 363, n. (1967)).

Although a substantial part of the rationale of *On Lee* has arguably been discredited in later cases[1], the case was cited with approval in *Lopez* v. *United States*, 373 U. S. 427, 438 (1963) and in *Katz* v. *United States*, 389 U. S. 347, 363 (1967) (Concurring opinion of Justice White).

The Government's use of conversations obtained by the deception of a Government agent has been dealt with in numerous cases, and the validity of such conduct has consistently been upheld where the conversation was freely entered into by the defendant.

Thus, in *Lopez* v. *United States*, 373 U. S. 427, 439 (1963), the Supreme Court held that the recording made by a Government agent of a bribe offer was properly admitted into evidence. Since the agent was entitled to, and did, testify about the conversation he had with the defendant, there was no "seizure" of anything without the defendant's knowledge and consent when he voluntarily participated in the incriminating conversation. The recording device, therefore, was used

[1] *E.g.*, *Warden* v. *Hayden*, 387 U. S. 294, 304 (1967): "The premise that property interests control the right of the Government to search and seize has been discredited." *Cf. Katz* v. *United States*, 389 U.S. 347, 353 (1967), *Silverman* v. *United States*, 365 U.S. 505 (1961); *Wong Sun* v. *United States*, 371 U. S. 471 (1963).

only to obtain the most reliable evidence possible of a conversation which the Government rightfully heard through its agent. Moreover, the case involved "no eavesdropping whatever in any proper sense of that term. The Government did not use an electronic device to listen in on conversations it could not otherwise have heard." 373 U. S. at 439. It followed that there was no search and seizure which violated the Fourth Amendment.

Even more recently decided were *Lewis* v. *United States,* 385 U. S. 206 (1966), and *Hoffa* v. *United States,* 385 U. S. 293 (1966). In *Lewis,* the Court held that where the defendant invited a person, who was a secret Government agent, into his house for the purpose of selling narcotics to the agent, the subsequent admission into evidence of the narcotic bought by the agent and the conversations which had taken place between the parties did not violate the Fourth Amendment since the agent took nothing which the defendant had not voluntarily given to him, and the deception did not nullify the defendant's consent.

In *Hoffa,* the Court held that no violation of the Fourth Amendment occurred when an acquaintance of defendant, whom defendant had invited to his hotel suite, heard conversations directed to him or to others in his presence. Unknown to defendant the acquaintance was a paid Government informer. Holding that this was merely a case of "misplaced confidence" rather than unreasonable search and seizure, the Court noted that "[n]either this Court nor any member of it has ever expressed the view that the Fourth Amendment protects a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it." (Citing Lopez). 385 U. S. at 302.

Taken together, these cases establish the principle that one who voluntarily enters into a conversation with

another takes the risk that such person may memorize, record, or (including *On Lee*) transmit the conversation.[2] It seems reasonable to conclude that if the recording in *Lopez* was not "eavesdroping," because it was done with the consent of one of the participants, and therefore not an unreasonable search and seizure, then a transmission is likewise not prohibited by the Fourth Amendment. Absent statutory prohibition, there is no legal significance in the fact that in one case, the transmission, a person is simultaneously overhearing the conversation with the consent of one of the participants while in the other a machine is employed to record such conversation for future disclosure. Therefore, I perceive no distinction which would require different treatment for purposes of the Fourth Amendment.

I do not read the recent decision in *Katz* v. *United States,* 389 U. S. 347 (1967) as changing the law as expressed in the cases just discussed. Nor do I view the decision in *Katz* as extending to the degree ascribed to it by the majority. In *Katz,* the Court reversed a conviction based upon one side of a telephone conversation overheard by Government agents by means of an electronic eavesdropping device installed on the public telephone booth in which defendant placed his call. The Court held that:

> "... the Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not subject to Fourth Amendment protection. See *Lewis* v. *United States,* 385 U. S. 206, 210; *United States* v. *Lee,* 274 U. S. 559, 563. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected. . . ." 389 U. S. at 351-352.

[2] It is important to note that, as in the instant case, there was no search warrant or court order in *Lopez, Lewis,* or *Hoffa.*

The use of this language by the Supreme Court illustrates the distinction between *Katz* and the instant case, and demonstrates the present state of the law. In *Katz*, the Government surreptitiously overheard one side of a conversation without the consent of either party thereto, and after the defendant had taken reasonable steps to protect his privacy. The Court, therefore, held that "[t]he Government's activities in electronically listening to and recording the petitioner's words violated the privacy upon which he justifiably relied while using the telephone booth and thus constituted a 'search and seizure' within the meaning of the Fourth Amendment." 389 U. S. at 353.

Unlike *Katz*, the instant case involves not a search and seizure, but a misplaced confidence—not surreptitious eavesdropping, but merely the obtaining of evidence of a conversation in which the Government, through its informer, was a participant. See *Lopez* v. *United States*, 373 U. S. 427, 439 (1963). Had the person on the other end of the telephone line in *Katz* allowed a Government agent to listen in on the conversation, there would have been no constitutional violation. *Rathbun* v. *United States*, 355 U. S. 107, 111 (1957); *United States* v. *Williams*, 311 F. 2d 721, 725 (7th Cir. 1963), cert. den. 374 U. S. 812 (1963). Thus, once the conversation is deprived of its private character through the consent of one of the parties thereto, the Fourth Amendment, not having prohibited the initial exposure, does not prohibit the introduction into evidence of the conversation as transmitted or recorded. As stated in *Katz*, itself, "what a person knowingly exposes to the public, *even in his own home or office*, is not subject to Fourth Amendment protection. See *Lewis* v. *United States*, 385 U. S. 206, 210. . . ." 389 U. S. at 351 (emphasis added).

Thus, any expectation, by defendant, of privacy, when the person to whom the defendant is speaking consents to exposure of the conversation is not reasonable and therefore not protected by the Fourth Amendment. This Court recently pointed out the distinction between electronic eavesdropping and misplaced confidence in *United States* v. *Haden,* 397 F. 2d 460 (7th Cir. 1968), where we held (at page 465):

> "One who intends a conversation or transaction to be private and takes reasonable steps to keep it private is protected from Government intrusion unauthorized by warrant or well-defined special circumstances. Cf. *Katz* v. *United States,* 389 U. S. 347 (1967). But he is not protected from the consequences of error, if he places trust in the silence, duplicity or complicity of a Government agent or informer."

Therefore, the application of *Katz* to the instant case is its recognition of the principle that:

> "When one man speaks to another he takes all the risks ordinarily inherent in so doing, including the risk that the man to whom he speaks will make public what he has heard. The Fourth Amendment does not protect against unreliable (or law-abiding) associates. *Hoffa* v. *United States, supra.* It is but a logical and reasonable extension of this principle that a man take the risk that his hearer, free to memorize what he hears for later verbatim repetition, is instead recording it or transmitting it to another. The present case [*Katz*] deals with an entirely different situation, for as the Court emphasizes, the petitioner "sought to exclude . . . the uninvited ear," and spoke under circumstances in which a reasonable person would assume that unin-

> vited ears were not listening." *Katz* v. *United States,* 389 U. S. 347, 363 n. (1967) (Concurring opinion of Justice White) (Emphasis supplied).[3]

In concluding that the Fourth Amendment does not prohibit the transmission of a conversation to a Government agent by a participant therein, where the defendant is a voluntary party to the conversation, I am mindful of the fact that, as recognized in numerous Supreme Court decisions,[4] as well as our own,[5] the strategem of deception is often the only way the Government can obtain information relating to a crime. To prohibit the use of such deceit might, in certain areas, prevent effective law enforcement. The Supreme Court in *Lewis* v. *United States,* 385 U. S. 206, at 210-211 (1966), cited with approval a quotation from the Model Penal Code § 2.10, comment, p. 16 (Tent. Draft No. 9, 1959):

> "Particularly, in the enforcement of vice, liquor or narcotics laws, it is all but impossible to obtain evidence for prosecution save by the use of decoys. There are rarely complaining witnesses. The participants in the crime enjoy themselves. Misrepresentation by a police officer or agent concerning the identity of the purchaser of illegal narcotics is a practical necessity. . . . Therefore, the law must attempt to distinguish between those deceits and persuasions which are permissible and those which are not."

---

[3] Justice White, in the same footnote, also cited *Hoffa, Lopez* and *On Lee* as cases "which are undisturbed by today's decision."

[4] *E.g., Lewis* v. *United States,* 385 U.S. 206, 208-211 (1966); *Sorrells* v. *United States,* 287 U. S. 435, 411-442 (1932); *Andrews* v. *United States,* 162 U. S. 429, 423 ((1896).

[5] *E.g., United States* v. *Haden,* 397 F.2d 460 (7th Cir. 1968); *United States* v. *Lauchli,* 371 F.2d 303 (7th Cir. 1966); See also *Cellino* v. *United States,* 276 F.2d 941 (9th Cir. 1960).

For the reasons stated above, I am of the view that the method of deception employed in the instant case is constitutionally permissible and is not so fundamentally unfair as to require reversal in the exercise of our supervisory power over the district court. Rather than being of an indiscriminate nature, as in *Berger* v. *New York,* 388 U. S. 41 (1967), *Katz* v. *United States,* 389 U. S. 347 (1967), and *Silverman* v. *United States,* 365 U. S. 505 (1961), the electronic transmission in the instant case included only those words which defendant voluntarily spoke to the informer and intended that he hear, thus knowingly taking the risk that the informer would disclose them to the Government.

Such view does not, therefore, approve or permit violation of the "requirements of the Fourth Amendment in the name of law enforcement," as *Berger* forbids (388 U. S. at 62), but rests on a conclusion compelled by an analysis of those decisions in which the Supreme Court has to date considered the subject matter.

HASTINGS, *Circuit Judge,* dissenting. I join Chief Judge Castle in his able dissent in this case. I wish to add a few brief comments of my own.

I was moved to vote for a rehearing *en banc* in the instant *White* case because I thought the majority opinion, written by the late Judge Schnackenberg, mistakenly relied upon *Katz* v. *United States,* 389 U. S. 347 (1967), as its authority for a reversal of the judgment of conviction. I thought at that time, as I do now, that the factual situation in *Katz* is so unlike the present case before us as to furnish no controlling precedent.

The original panel opinion was handed down in slip opinion form on March 18, 1968. Judges Major and Schnackenberg were in the majority, with Chief Judge Castle in dissent. It is conceded in the present *en banc*

majority opinion that the author of the prior panel majority decision was of the view that the rationale of *Katz* required a reversal of White's conviction. Yet that is precisely the same position taken by Judge Swygert in the instant majority opinion. Why was it necessary to indulge in this exercise in semantics to reach the same result on the same cited authority?

I concede that Judge Swygert's majority opinion is a sophisticated constitutional essay in contrast to the short direct approach taken by Judge Schnackenberg. But therein may lie a present danger. With deference, I suggest that the present majority has undertaken a broad construction of *Katz* that was not taken by the Supreme Court. For a stimulating treatment of the subject I recommend the reading of *Katz* v. *United States*: The Limits of The Fourth Amendment, by Edmund W. Kitch, Associate Professor of Law, The University of Chicago.[1]

My final comment is directed to the rather summary reversal of *On Lee* v. *United States,* 343 U. S. 747 (1952), by the majority here. Chief Judge Castle has ably covered this in his dissent. My fundamental objection to the majority mistreatment of *On Lee* is that it has no authority to do what it did. I have long held the rather old fashioned view that only the Supreme Court could set aside its holdings. By the process of taking a head count and making a guess on what the Court may do at some future time, the majority holds: "On its facts, *On Lee* is directly in point and would control the disposition of this case if *Katz* had not supervened and if the Supreme Court had not on other occasions completely eroded the decisional basis of *On Lee.*"

---

[1] Released a few days ago by The University of Chicago Press, as a chapter in The Supreme Court Review, 1968, pp. 133-152, edited by Professor Philip B. Kurland.

I make no prophecy on the future of *On Lee*. Until it is set aside by the Supreme Court, I regard it as controlling and dispositive of the present appeal. I would affirm the judgment of conviction.

A true Copy:

Teste:

____, ____,

Clerk of the United States Court of Appeals for the Seventh Circuit.

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Chicago, Illinois 60604

Tuesday, January 7, 1969

Before: Hon. LATHAM CASTLE, Chief Judge, Hon. J. EARL MAJOR, Senior Circuit Judge, *Hon. ELMER J. SCHNACKENBERG, Circuit Judge, Hon. JOHN S. HASTINGS, Circuit Judge, Hon. ROGER J. KILEY, Circuit Judge, Hon. LUTHER M. SWYGERT, Circuit Judge, Hon. THOMAS E. FAIRCHILD, Circuit Judge, Hon. WALTER J. CUMMINGS, Circuit Judge, Hon. OTTO KERNER, Circuit Judge.

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*

vs.

JAMES A. WHITE, *Defendant-Appellant.*

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division, on rehearing *en banc.*

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is

---

* Although Judge Schnackenberg participated in the en banc rehearing, he died prior to the adoption of this opinion. As author of the prior panel decision of this court, he was of the view that the rationale of Katz v. United States, 389 U.S. 347 (1967) required reversal of White's conviction.

hereby, REVERSED, and that this cause be, and it is hereby REMANDED to the said District Court for a new trial, in accordance with the opinion of this Court filed this day.

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1968

No. 1024

UNITED STATES, Petitioner,

v.

JAMES A. WHITE

ORDER ALLOWING CERTIORARI—Filed April 7, 1969.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1969—361-664/144

In the Supreme Court of the United States

OCTOBER TERM, 1968

No.

UNITED STATES OF AMERICA, PETITIONER

v.

JAMES A. WHITE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case, entered on January 7, 1969.

OPINIONS BELOW

The opinion of the court of appeals (App. A, pp. 7-15, *infra*), and its opinion on rehearing *en banc* (App. B, pp. 16-41, *infra*) are not yet reported.

JURISDICTION

The judgment of the panel of the court of appeals was entered on March 18, 1968. A petition for rehearing *en banc* was granted, and the *en banc*

decision of the court of appeals (App. C, p. 42, *infra*) was rendered on January 7, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, under the ruling in *Katz* v. *United States,* 389 U.S. 347, the district court should have excluded testimony by federal agents as to conversations between petitioner and an informant which the agents overheard by means of an electronic device carried by the informant, with the informant's consent, but without obtaining a warrant.

2. Whether, even if otherwise applicable to overhearings accomplished with the consent of one of the parties to the conversation, *Katz* v. *United States,* should be applied to such an overhearing which occurred prior to the date *Katz* was decided.

STATEMENT

After a jury trial in the United States District Court for the Northern District of Illinois, respondent was convicted on seven counts charging narcotics violations (26 U.S.C. 4705(a); 21 U.S.C. 174). He was sentenced as a second offender to a total of twenty-five years' imprisonment and a $35,000 fine.

The evidence, which is set forth in detail in the opinion of the court below (App. B, pp. 17-21, *infra*), consisted almost entirely of the testimony of federal narcotics agents, who kept petitioner under visual and auditory surveillance while he carried on a series of sales (involving approximately three pounds of heroin) to one Jackson, a government informant, in the period from December 1965 to January 1966. The

agents testified to the contents of several incriminating conversations between Jackson and respondent which they overheard by the use of a Kel device (a transmitter) placed on Jackson's person with his consent. The conversations took place in Jackson's home and automobile, as well as respondent's home, automobile and place of business. Because the government was unable to locate Jackson at the time of trial, he did not testify.

A panel of the court of appeals originally reversed the conviction (one judge dissenting) on the ground that under *Katz* v. *United States,* 389 U.S. 347, the federal agents were required to obtain a search warrant before using electronic means to overhear petitioner's conversations with the informant who had consented to the overhearing (App. A, *infra*). The court *en banc* adhered to that interpretation, three judges dissenting (App. B, *infra*).

ARGUMENT

1. The opinion below is in conflict with a number of cases from the Second and Fifth Circuits (in which certiorari has been denied) holding that the search warrant requirement of *Katz* v. *United States,* 389 U.S. 347, does not apply to situations where one party has consented to have his conversation electronically monitored. See, *e.g., Long* v. *United States,* 387 F. 2d 377 (C.A. 5), certiorari denied, 390 U.S. 952; *Fountain* v. *United States,* 384 F. 2d 624 (C.A. 5), certiorari denied *sub nom. Marshall* v. *United States,* 390 U.S. 1005; *Handsford* v. *United States,* 390 F. 2d 373 (C.A. 5), certiorari denied, 391 U.S. 915; *United States* v. *Leighton,* 386 F. 2d 822 (C.A. 2), certiorari denied, 390

U.S. 1025; *United States* v. *Jackson,* 390 F. 2d 317 (C.A. 2), certiorari denied, 392 U.S. 935.[1]

Katz involved the distinct problem of the use of electronic equipment to overhear conversations without the consent of either party. It did not purport to overrule *Lopez* v. *United States,* 373 U.S. 427, sustaining the use of electronic monitoring equipment by law enforcement officers without a warrant, where one party to the conversation had given his consent. See also *On Lee* v. *United States,* 343 U.S. 747. Where consent has been given, the situation is no different from that in which a person makes incriminating admissions to one who, unknown to him, is an informer or undercover agent. In such a case, the source of the criminal's undoing is not any unwarranted intrusion by the government into a right of privacy protected under the Fourth Amendment, but rather the criminal's misplaced confidence in the person to whom he has entrusted the information. See, *e.g., Hoffa* v. *United States,* 385 U.S. 293; *Lewis* v. *United States,* 385 U.S. 206. This Court in *Lopez* recognized that such a risk of disclosure of incriminating information (which respondent, by dealing with the informer, voluntarily assumed) is not materially enlarged merely because law enforcement officers have used an electronic device "to obtain the most reliable evidence possible of a conversation in which the Government's own agent was

---

[1] The Second and Fifth Circuits have adhered to this position even after the *en banc* decision in the instant case, and have expressly noted their disagreement with that decision. *United States* v. *Kaufer* (No. 32692, C.A. 2, decided January 14, 1969); *Koran* v. *United States* (No. 25446, C.A. 5, decided January 27, 1969).

a participant and which that agent was fully entitled to disclose" 373 U.S. at 439. The decision in *Katz,* which explicitly recognized that what "a person knowingly exposes to the public, even in his own home or office, is not subject to Fourth Amendment protection" (389 U.S. at 351-352) is consistent with *Lopez.* See 389 U.S. at 363 n. (White, J., concurring). Congress has indicated a similar interpretation in expressly excluding the consent situation from the punishment and nondisclosure provisions of its recently enacted wiretapping and electronic surveillance legislation, Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (82 Stat. 211-225). See particularly, 18 U.S.C. 2511(2)(c), 2515 (82 Stat. 214, 216).

The majority of the court below sought to distinguish *Lopez* on the ground that there the informer testified and the electronic recordings were introduced only in corroboration. We recognize that this difference has been given weight. See the concurring opinion of the Chief Justice in *Lopez,* 373 U.S. at 442-446; but compare the dissenting opinion of Mr. Justice Brennan, *id.* at 448, 451. In our view, however, the decision whether government agents must obtain a search warrant before undertaking to overhear the conversation with the consent of a party thereto cannot be made to turn on the presence or absence of the informer as a witness at the subsequent trial—a matter not always within the prosecutor's control.

The question of the legality of placing transmitting devices on undercover agents and informants is one of significance in federal law enforcement. The underlying assumption of the Omnibus Crime Act is that

a warrant is not required where a transmitting or recording device is carried by one party to the conversation.

2. The question whether the *Katz* holding is to be applied retroactively is pending in *Desist, et al.* v. *United States,* No. 12, this Term. In this case the agents' conduct occurred prior to the *Katz* decision. If the Court holds in *Desist* that *Katz* is not to be applied retroactively, then it would not seem inappropriate to summarily reverse the judgment below on the basis of *Desist.*

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

FEBRUARY 1969

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

SEPTEMBER TERM, 1967—JANUARY SESSION, 1968

Nos. 16021-16022

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*

v.

JAMES A. WHITE, *Defendant-Appellant.*

March 18, 1968

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

Before *Senior Circuit Judge* MAJOR, SCHNACKENBERG and CASTLE, *Circuit Judges.*

SCHNACKENBERG, *Circuit Judge.* James A. White, defendant, appeals from a judgment following trial by jury, adjudging him guilty of violating 26 U.S.C. § 4705 (a) and 21 U.S.C. § 174. According to his counsel's brief, defendant was sentenced to a total imprisonment of 25 years and to pay a total of $35,000 in fines.

Foremost among errors relied upon are those said to arise out of interceptions of telephone and radio transmissions and the surreptitious placing of a radio transmitter on the person of a government informer during the time that he was conversing with defendant in various locations.

The government's evidence tended to prove the following events which are typical of other episodes not set forth herein.

On December 9, 1965, Harvey Jackson, a government informer, met defendant in the kitchen of the inform-

er's home. He had concealed on his person a Kel radio transmitter. While narcotics agent Carl Jackson was concealed in a kitchen closet, he overheard a conversation between Harvey Jackson and defendant, and observed defendant give a package to Harvey. The package contained heroin. The closet had two doors which the agent left ajar so that he could see defendant and the informer, who asked the number of ounces in the package, and defendant said "one good ounce". Defendant added that he would come the next day for the money. Narcotics agent DeFauw overheard this conversation through a receiver.

The next day agent Jackson was again in the closet, from which he observed Harvey and defendant count $1,000, in official funds previously given Harvey by agent DeFauw, which defendant put in his pocket. Agent Jackson also heard defendant tell the informer he would get more "stuff" on December 24 and arrange to meet the informer at 6 p.m. the next day at Lake and Wells streets for further payment. DeFauw overheard that conversation by receiving radio transmissions from a Kel transmitter previously concealed on the informer's person.

On December 14, 1965, DeFauw placed the Kel set on the informer's person, furnished him with $360 and followed him to the residence of defendant. DeFauw overheard by radio receiver a conversation between defendant and the informer, in defendant's house, in which the money was counted and arrangements made for defendant to sell the informer another two ounces of "stuff" on December 16, for $1250, with payment due within a week and a half after delivery. Defendant said he wanted the money faster, as the "Dagoes" wanted their money sooner. Arrangements were made to meet at 6 o'clock on December 16.

On December 16, 1965, DeFauw placed the Kel set

under the informer's clothing and followed him to Clark and Wacker streets, where the informer Jackson met defendant, who entered informer's car. Agent DeFauw, following them in his car, overheard their conversation about the price and quality of heroin by radio receiver. Thereafter the informer left the car, as defendant said he had to meet "this man". Defendant drove the car to State and Randolph streets, where he picked up Sam Minerva, who rode for one-half block. From State and Randolph streets, agent Kerstann followed defendant to Lake and Wells streets, where the informer re-entered his own car. Kerstann by radio receiver overheard defendant say he had met "this man" and would leave the package on the seat. Defendant left the car. Kerstann entered the informer's car and the informer pointed to a package which contained heroin.

On December 28, 1965, DeFauw again placed the Kel set under the informer's clothes and gave him $1250. DeFauw followed agent Jackson and the informer to the latter's residence where *agent Jackson concealed himself in the closet. Defendent later arrived and asked if the informer had the money and they counted out $1250. The informer asked for more "stuff" and defendant said he could get some the next day, but he had to have the money faster as the Dago wanted fast delivery of money.*

From the closet agent Jackson overheard this conversation and observed the transfer of money. Agent DeFauw listened by radio receiver.[1]

On December 29, 1965, agents Connolly and Lewis followed defendant from his residence and into a tavern at 225 North Clark Street, where defendant talked

[1] The foregoing italicized language is taken from the statement of facts, which the evidence tended to prove, included in the brief filed by appellant.

briefly to Harry B. Williams. Connolly saw him go to a nearby Hyman's Clothing Store. Williams then left. Defendant, observed by agents, left Hyman's and drove to State and Randolph Streets where he picked up Minerva who rode for one-half block. Minerva was carrying a white shoe box. When he left the car he was carrying a black brief case. One block later defendant picked up Williams. Meanwhile the informer, equipped with a Kel transmitter, had entered said tavern. Defendant and Williams returned to the tavern. Defendant entered, Williams remaining in the car. Defendant talked to the informer and drove to Lake and Wells Streets. The informer followed. Defendant walked to the informer's car and handed him a sack. Over the radio, Meyer heard defendant ask the informer to take Williams south to Kimbark Avenue and Midway Plaisance. The informer did so. Williams was also carrying a brown paper bag. At 62nd Street and Drexel Avenue the informer gave agent DeFauw a brown paper sack. It contained heroin.

On January 5, 1966, DeFauw placed the Kel set on the informer and give him $1300. Agent Jackson concealed himself in the kitchen closet of the informer's home. He observed defendant and informer count the money. Defendant told the informer to bring the "remaining $950" to his restaurant, the Dining Room Aluminer. DeFauw heard the conversation by Kel receiver. Defendant wanted the informer to purchase large sums of heroin and to pay in advance.

On January 7, 1966, the informer was in company with agents DeFauw and Kerstann at 59th Street and Stony Island Avenue. DeFauw placed the Kel set on the informer, gave him $950 and followed him to defendant's restaurant which the informer entered. DeFauw heard over his receiver defendant tell the informer that the price of heroin was going up, and to

meet him at Lake and Wells and defendant would get three "things" for $2500.[2]

On January 8, 1966, at 6 p.m. DeFauw saw Minerva standing at State and Randolph Streets. Defendant drove up, stopped, opened the door, and Minerva approached the car. Defendent said "come on, man, give me the package, I've got to get out of here." Minerva handed a brown leather briefcase into the car and said he would pick up the money later. DeFauw placed defendant under arrest and seized the briefcase. It contained heroin.

Early in the trial, when agent Jackson testified that he listened in on a telephone conversation between the informer and defendant, objection by the defense was made on the ground that such interception was a violation of the law of Illinois, as well as the federal constitution and law, but the objection was overruled.

Also the defense objected when DeFauw testified about receiving radio transmissions from the transmitter concealed on the person of the informer. The objection was overruled. At the conclusion of the government's case, a motion by the defense to strike various radio conversations and transmissions to which the various agents testified, on the ground that they were in violation of the Illinois Eavesdropping Statute, and the state's public policy, as well as the fourth and fifth amendments to the federal constitution, was denied by the court.

1. Defendant was convicted of the possession and sale of narcotics largely as a result of the testimony of federal narcotics agents that they heard defendant make self-incriminating statements, which had been transmitted over the air by an electronic device hidden under the informer's clothes. Thereby the agents

[2] Witness DeFauw was given his report to refresh his recollection. The record shows that this report was given to defense counsel when he started a cross-examination of DeFauw.

heard conversations taking place in defendant's home, his car, his place of business, as well as in the informant's house and car. The evidence clearly shows that by these means government agents were able to, and did, testify to what they thus heard, including admissions by defendant. Informer Jackson did not testify at the trial. There is no contention that the government relied on any warrant or court order.

In *Katz* v. *United States,* 389 U.S. 347 (1967), the Supreme Court reversed a conviction obtained after a trial during which the government had introduced defendant's telephone conversation overheard by federal agents through a device they had attached to the outside of a public telephone booth. In the absence of a proper warrant or judicial order, surveillance was held to be "per se unreasonable under the fourth amendment" even though the F.B.I. investigation activities established "a strong probability" that defendant was violating federal law.

The importance of the *Katz* holding we pointed out in *United States* v. *Hagarty,* No. 15881 (January 11, 1968):

> "* * * Thus the Government first urges that Nasser's government office was not a constitutionally protected area. A similar argument with respect to the public telephone booth was rejected in *Katz,* where Mr. Justice Stewart pointed out that 'the Fourth Amendment protects people, not places,' and that what a person 'seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.' The key is whether defendant sought to exclude 'the uninvited ear.' Under this rationale, it is immaterial that the overheard conversation took place in an IRS office. The Fourth Amendment applies 'Wherever a man may be * * *.' 36 U.S. Law Week at 4081, 4083."

In the case at bar, the well-laid plans of the government agents were obviously made because the government recognized that defendant sought to exclude the "uninvited ear". For instance, why would it have hired informer Jackson, placed upon his person a hidden radio transmitter, and concealed agent Jackson in a kitchen closet of the home of the informer and thereby arranged to have a conversation between the informer Jackson and defendant overheard by agent Jackson?

By the particular means of surveillance used, it seems to us patent that the government recognized that defendant's rights under the fourth amendment, as declared in the rulings of the United States Supreme Court, had to be respected. We now apply the principles announced by the Supreme Court in its recent pronouncement in *Katz* to the situation here presented.

At 353, the court said:

> "* * * once it is recognized that the Fourth Amendment protects people—and not simply 'areas'—against unreasonable searches and seizures, it becomes clear that the reach of that Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure.
>
> "* * * The Government's activities in electronically listening to and recording the petitioner's words violated the privacy upon which he justifiably relied while using the telephone booth and thus constituted a 'search and seizure' within the meaning of the Fourth Amendment. * * *"

At 357, the court added:

> "* * * Searches conducted without warrants have been held unlawful 'notwithstanding facts unquestionably showing probable cause,' * * * and that searches conducted outside the judicial proc-

ess, without prior approval by judge or magistrate are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.

"* * * Even electronic surveillance substantially contemporaneous with an individual's arrest could hardly be deemed an 'incident' of that arrest. Nor could the use of electronic surveillance without prior authorization be justified on grounds of 'hot pursuit.' And, of course, the very nature of electronic surveillance precludes its use pursuant to the suspect's consent.

"* * * And bypassing a neutral predetermination of the *scope* of a search leaves individuals secure from Fourth Amendment violations 'only in the discretion of the police.' * * *

"These considerations do not vanish when the search in question is transferred from the setting of a home, an office, or a hotel room to that of a telephone booth. Wherever a man may be, he is entitled to know that he will remain free from unreasonable searches and seizures. The government agents here ignored 'the procedure of antecedent justification . . . that is central to the Fourth Amendment,' a procedure that we hold to be a constitutional precondition of the kind of electronic surveillance involved in this case. Because the surveillance here failed to meet that condition, and because it led to the petitioner's conviction, the judgment must be reversed."

This language, which is clear and convincing, is decisive here. In accordance with the ruling in *Katz,* we hold that the judgment from which this appeal was taken must be reversed.

2. In view of our disposition of this issue we find it unnecessary to consider other alleged trial errors cited by appellant.

Accordingly the judgment of the district court is reversed.

JUDGMENT REVERSED.

Nos. 16021 and 16022

CASTLE, *Circuit Judge,* dissenting. Unlike the situations presented in *Katz* v. *United States,* 389 U.S. 347, and *Berger* v. *New York,* 388 U.S. 41, there was no "eavesdropping" involved in the instant case. Here, one party to the conversations consented to their electronic recording and transmission. Although, like in *Hoffa* v. *United States,* 385 U.S. 293 and *Lewis* v. *United States,* 385 U.S. 206, such activity constituted a betrayal of the defendant's confidence, he did intend the informer to hear what he was told. And, that the informer breached the confidence the defendant reposed in him by recording and transmitting the conversations—or in permitting a government agent to overhear them—does not violate any constitutional right of the defendant.

In our recent decision in *United States* v. *Hagarty* (No. 15881, Opinion filed January 11, 1968) cited by the majority this Court pointed out that, "[n]either Hagarty nor Nasser had consented to the eavesdropping".

A true Copy:

Teste:

____, ____,

Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

SEPTEMBER TERM, 1968—SEPTEMBER SESSION, 1968

No. 16021-16022

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*

v.

JAMES A. WHITE, *Defendant-Appellant.*

January 7, 1969

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division. On rehearing en banc.

Before CASTLE, *Chief Judge,* MAJOR, *Senior Circuit Judge,* SCHNACKENBERG,[1] HASTINGS, KILEY, SWYGERT, FAIRCHILD, CUMMINGS, and KERNER, *Circuit Judges.*

SWYGERT, *Circuit Judge.* The defendant, James A. White, was tried before a jury and convicted on seven counts of two consolidated indictments which charged him with certain narcotics violations arising under the provisions of 26 U.S.C. § 4705(a) and 21 U.S.C. § 174. The district court imposed a prison sentence of twenty-five years and fined the defendant $35,000.

A three-judge panel of this court, one judge dissenting, reversed the judgment of conviction. Subsequently, the Government's petition for a rehearing en banc was

[1] Although Judge Schnackenberg participated in the en banc rehearing, he died prior to the adoption of this opinion. As author of the prior panel decision of this court, he was of the view that the rationale of *Katz* v. *United States*, 389 U.S. 347 (1967) required reversal of White's conviction.

granted. Upon consideration of this cause by the entire court, we are of the opinion that our prior decision should be followed and that the district court's judgment of conviction must be reversed and the case remanded for a new trial.

The principal error relied upon by the defendant and the one which controls our disposition of this appeal was the admission into evidence of certain incriminating statements made by the defendant which were overheard by means of electronic eavesdropping by Government agents. This eavesdropping was accomplished by the placing of a radio kel set transmitter [2] on the person of a Government informer, Harvey Jackson, before he talked with White at various locations, including the defendant's home, automobile, and place of business, as well as the informer's home. At no time did the agents of the Federal Bureau of Narcotics secure a search warrant or court order authorizing such eavesdropping.

The Government's evidence tended to prove the following facts. On December 9, 1965, Harvey Jackson, the informer, who did not testify at trial, met defendant White in the kitchen of the informer's Chicago home. The informer had concealed on his person a kel set transmitter and had allowed a narcotics agent, Carl Jackson, to hide himself in a closet adjacent to the kitchen. While agent Jackson was so concealed, he overheard a conversation between informer Jackson and White and observed White transfer a package to the informer. This package, according to subsequent tests, contained heroin. From inside the closet where he could see White and the informer through the slightly open doors, agent Jackson overheard the informer inquire how many ounces there were in the package; the defendant responded, "one good ounce." After asserting

[2] A radio kel set is a small transistorized device which transmits voices or sound which can be picked up on receiving units.

that he would return the following day for payment, the defendant left the informer's home. Narcotics agent Robert DeFauw who was situated in an automobile outside the informer's home overheard the entire conversation on a radio which received transmissions from the informer's kel set.

On December 10, 1965 the informer called White from a public telephone and arranged an appointment for that day at the informer's home so that payment for a prior narcotics transfer could be made. Agent Jackson, with the informer's permission, overheard this conversation on the same telephone receiver used by the informer. Agent Jackson and the informer then went to the latter's home, where agent Jackson again concealed himself in the closet and observed the informer and White count $1,000 in official funds, previously given the informer by agent DeFauw. White put the money in his pocket, told the informer that he would get more "stuff" on December 14, and requested the informer to meet him at 6 p.m. the next day on a specified Chicago street corner for further payment. Again agent DeFauw overheard the entire conversation in his car outside the informer's home by receiving radio transmissions from the kel set which had been previously concealed on the informer's person.

On December 14, 1965 agent DeFauw placed a kel set on the informer's body, furnished him with $360, and followed him to the defendant's residence. A conversation between the defendant and the informer which took place inside the defendant's home was overheard on a radio receiver by agent DeFauw at his position outside White's home. During the course of this monitored conversation, money was counted and arrangements were made for the defendant to sell an additional two ounces of "stuff" on December 16 for $1,250, with payment due within a week and a half after delivery. The de-

fendant requested faster payment since his suppliers wanted their money sooner and arrangements were made to meet again at 6 p.m. on December 16.

On December 16, 1965 agent DeFauw placed a kel set under the informer's clothing and followed him to a Chicago intersection where the informer met White who entered the informer's car. While White and the informer drove around the city for two hours, agent DeFauw, following them in his car, overheard by radio receiver their conversation concerning the price and quality of heroin. Thereafter the informer left the car because White said he had to meet "this man." White drove the car a few blocks to another Chicago intersection where he picked up Sam Minerva, a supplier of narcotics. At this point agent William Kerstann who was trailing White, observed Minerva emerge from the car after riding a short distance. Kerstann followed White a couple of blocks to a street corner where the informer re-entered the car. By radio receiver, Kerstann overheard the defendant say that he had met a certain man and received a package which he would leave on the seat of the informer's car. Then White said he had to leave the informer in order to meet another man. After White's departure, agent Kerstann entered the car and seized the package containing heroin.

On December 28, 1965 the informer was given $1,250 and a kel set was placed under his clothes. While followed by agent DeFauw, agent Jackson and the informer drove to the latter's residence, where agent Jackson resumed his usual surveillance position in the kitchen closet. Jackson saw the defendant enter the kitchen, sit down at a table, and join the informer in counting the $1,250. When the informer requested more heroin. White advised him that more would be forthcoming the following day, but that payment would have to be made

more quickly because the supplier "wanted his money." Agent Jackson overheard the conversation from the closet and agent DeFauw listened on a radio receiver from his position in a car outside the informer's residence.

On the following day, agents David Connolly and Arthur Lewis followed White from his residence to a tavern where he talked briefly to Harry D. Williams, another narcotics peddler, and then departed. After stopping at a clothing store, White drove to a Chicago intersection where he picked up Minerva who accompanied White for one-half block. Although Minerva was carrying a white shoe box when he entered White's car, he left with a black briefcase. White drove a block, picked up Williams, and returned to the tavern where they had talked earlier the same day. Meanwhile the informer, equipped with a kel set, had entered the same tavern. While Williams remained in the car, White went into the tavern and talked with the informer. They left and drove a few blocks in separate cars to a point where the defendant stopped, got out of his car, walked to the informer's car, and handed him a sack. Agent Vernon Meyer, who had been surveilling the informer's activities, heard over a radio in his car the defendant ask the informer to take Williams to the city's south side. Williams, also carrying a brown paper sack, entered the informer's car and drove with him to their appointed destination. After discharging Williams, the informer met agent DeFauw and gave him the paper sack which contained heroin.

On January 5, 1966 agent DeFauw placed a kel set on the informer and gave him $1,300. From the closet in the informer's kitchen where he was secreted, agent Jackson observed the defendant and the informer count the money. The defendant told the informer to bring the "remaining $950" to the Dining Room Aluminer, a restaurant operated by White. White also requested

that the informer purchase a large amount of heroin and pay in advance. The entire conversation was heard by agent DeFauw over the radio in his car.

Two days later, the informer was given $950 and had a kel set placed on his person by agent DeFauw. The agent followed the informer to White's Dining Room Aluminer which the informant entered. From his automobile, agent DeFauw heard over his radio the defendant tell the informer that the price of heroin was going up and that he should meet White at a Chicago intersection where a $2,500 heroin delivery would be made.

On January 8, 1966 agent DeFauw saw Minerva standing at a city bus stop. The defendant drove up, stopped, opened the door, and Minera approached the car. White said, "Come on, man, give me the package, I've got to get out of here." Minerva handed a brown leather briefcase into the car and said that he would pick up the money later. Agent DeFauw placed the defendant White under arrest and seized the briefcase containing heroin.

The Government's evidence was based largely upon oral testimony by the narcotics agents that they overheard incriminating statements made by White to the secret informer, Harvey Jackson, and transmitted by the kel set device. As we have heretofore stated, these transmitted conversations occurred in the defendant's home, automobile and place of business as well as in the informer's automobile and home.[3] The defense objected when agent DeFauw and other agents testified concerning White's incriminating statements transmitted from

[3] There can be no doubt that these may be constitutionally protected areas. "Wherever a man may be, he is entitled to know that he will remain free from unreasonable searches and seizures." *United States.* v. *Katz*, 389 U.S. at 359. *See also, United States* v. *Hagarty*, 388 F. 2d 713 (7th Cir. 1968); *Lanza* v. *New York*, 370 U.S. 139 (1962) (jail visiting room not a protected area). It is not the area alone, but the relationship between the area and the person protected that is critical.

the kel set concealed on the informer's body. The objection was overruled. A motion by the defense made at the conclusion of the Government's case to strike the conversations to which the various agents testified on the ground that they were in violation of the fourth and fifth amendments was denied by the court.

The central issue presented is whether defendant White's fourth amendment rights, protecting him against governmental intrusion by unreasonable search and seizure, were infringed when the Government narcotics agents electronically intercepted his private conversations.

To decide the constitutionality of the Government's surreptitious overhearing of White's conversations, we apply the criteria recently set forth in *Katz* v. *United States,* 389 U.S. 347 (1967). The facts of *Katz* were that Federal Bureau of Investigation agents, having probable cause and acting in a carefully controlled manner but without prior judicial approval, placed an electronic listening and recording device outside a public telephone booth and intercepted telephone conversations which the defendant made from the booth to others without the knowledge or consent of the defendant or any of the other parties to the conversations. In reversing the defendant's conviction, the Supreme Court held that the admission of these conversations as evidence, covertly obtained by electronic surveillance, was improper because they were seized in violation of the defendant's fourth amendment rights. Essentially, the Supreme Court's determination was grounded on the lack of prior judicial authorization, because no search warrant had been obtained, and the fact that under the circumstances antecedent justification before a magistrate was essential to insure the defendant's fourth amendment guarantees.

The *Katz* opinion stated that the fourth amendment is designed to preserve privacy against the "uninvited

ear" of governmental intrusion and must be applied to "protect people, not places."[4] The trespass doctrine, suggested earlier in *Olmstead* v. *United States,* 277 U.S. 438 (1928), and *Goldman* v. *United States,* 316 U.S. 129 (1942), and which provided the basis for prior Supreme Court decisions in this area, such as *On Lee* v. *United States,* 343 U.S. 747 (1952), was squarely discarded by the Court in *Katz:* "[T]he underpinnings of *Olmstead* and *Goldman* have been so eroded by our subsequent decisions that the 'trespass' doctrine there enunciated can no longer be regarded as controlling." 389 U.S. at 353.

The *Katz* case further indicates that conversations are within the scope of the fourth amendment's protection: "[T]he Fourth Amendment governs not only the seizure of tangible items, but extends as well to the recording of oral statements, overheard without any 'technical trespass . . . under local property law.' *Silverman* v. *United States,* 365 U.S. 505, 511." 389 U.S. at 353. Consequently, White's covertly overheard statements are within the scope of the fourth amendment's guarantees.

The Government urges us to disregard the *Katz* rationale because of certain factual differences. Although we recognize these factual differences, we believe them to be without legal significance. It is true that the *Katz* case involved governmental interception of a conversation without the consent or knowledge of either party, whereas in the present case one party to the monitored conversation, informer Jackson, was cognizant of the Government's eavesdropping activities.

It is our opinion, however, that the surreptitious

---

[4] The relationship between eavesdropping and the right to privacy has been the source of continuing judicial concern. Wiretapping and other forms of eavesdropping are recognized by even their most zealous advocates as encroachments on a man's right to privacy, characterized by Justice Brandeis as "the most comprehensive of rights and the right most valued by civilized men." *Olmstead* v. *United States,* 277 U.S. 438, 478 (1928) (dissenting opinion).

placing of the kel set on informer Jackson was for all conceptual purposes the same as the surreptitious wiring of the telephone booth in *Katz*. Each act was part of a "bugging" technique by which a conversation was transmitted to an "uninvited ear"—government agents. The crucial fact in each case is that the respective speakers did not consent to the overhearing of their statements and that the conversations were overheard by third persons uninvited by the speaker.

To claim, as the Government does, that one party can waive the fourth amendment rights of another is the same thing as saying that *Katz* would have been decided differently if the recipient of the intercepted phone call had consented to the Government's bugging. We are unable to believe that such a meaningless form of consent would have rendered the defendant's overheard statements any more admissible in *Katz*. Since we think no distinction of constitutional significance can be drawn between the third party overhearing presented in *Katz* and the consensual monitoring here, the fact of listener consent is without decisional significance and cannot operate as a waiver of any speaker's fourth amendment rights.[5]

The content of the defendant's private conversations, intercepted by the Government's clandestine activity and without prior judicial control, must be held as per se inadmissible evidence if the language of *Katz* is literally applied:

---

[5] In holding that the rationale of *Katz* applies regardless of whether one party to a private conversation consents to the Government's interception of the conversation, we do not purport to make any determination regarding the voluntariness of informer Jackson's participation in the agents' scheme. Since it is our view that a listener's consent is irrelevant, it is difficult to see how informer Jackson's conduct, whether the product of coercion or consent, could have constituted a waiver of the defendant's constitutional rights. Only his own consent could have created such a waiver. The rationale of *Katz* permits no other conclusion.

> Searches conducted without warrants have been held unlawful "notwithstanding facts questionably showing probable cause," *Agnello* v. *United States,* 269 U.S. 20, 33, for the Constitution required "that the deliberate, impartial judgment of a judicial officer . . . be interposed between the citizen and the police. . . ." *Wong Sun* v. *United States,* 371 U.S. 471, 481-82. "Over and again this Court has emphasized that the mandate of the [Fourth] Amendment requires adherence to judicial processes," *United States* v. *Jeffers,* 342 U.S. 48, 51, and that searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment —subject only to a few specifically established and well-delineated exceptions.[6] *Katz* v. *United States,* 389 U.S. at 357 [footnotes omitted].

It is especially important that the Court in *Katz* referred with approval to *Osborn* v. *United States,* 385 U.S. 323 (1966), where the essentiality of prior authorization was emphasized. In *Osborn* a paid informer recorded conversations between himself and the defendant in order to corroborate his sworn statement that the defendant was attempting to employ him to bribe a prospective juror. *Osborn* teaches what the agents in

---

[6] These exceptions permit a warrantless search whenever the burden of obtaining a warrant would be likely to frustrate the purpose of the search. *See, e.g., Camara* v. *Municipal Court,* 387 U.S. 523, 533 (1967). Thus, the Court has allowed a warrantless search of an automobile on the ground that it might leave the jurisdiction before a warrant could be obtained, *Carroll* v. *United States,* 267 U.S. 132 (1925), and has approved taking a blood sample without first securing a warrant as necessary to prevent dissipation of the blood's alcoholic content, *Schmerber* v. *California,* 384 U.S. 757 (1966). In the present case, the Government did not argue that the evidence would have been lost due to the delay of obtaining a warrant, nor do the facts suggest that such an argument could have been made.

the instant case should have done, but failed to do, namely, obtain a warrant authorizing the use of electronic surveillance devices.

The exceptions to the warrant rule of *Osborn* and *Katz* which are explicitly mentioned in the *Katz* opinion do not have application to the governmental eavesdropping endeavors presented by the present case. In fact, our conclusion that the agents' testimony relating to the transmitted statements of the defendant which they overheard is inadmissible is strengthened by the Supreme Court's unequivocal language which clearly precludes the existence of any fourth amendment exception for consensual surveillance. "And, of course, the very nature of electronic surveillance *precludes* its use pursuant to the suspect's consent." *Katz* v. *United States,* 389 U.S. at 358 (emphasis added). Thus the literal language of *Katz* as applied to the case before us would require reversal since White did not consent to the eavesdropping and no antecedent justification was sought.

Our view as to the result which must be reached upon the application of the *Katz* principles is reinforced by our understanding of the fourth amendment. That amendment's search and seizure protection is lost to a person when his actions as a matter of law can be said to constitute a waiver of his right. Since the fourth amendment protects a speaker's right to privacy, this right would be illusory if it could be waived by other individuals.

The decisions provide a catalogue of instances where a speaker's behavior is such that a waiver of his fourth amendment rights has occurred as a matter of law. For example, *Hoffa* v. *United States,* 385 U.S. 293 (1966), is based on the unarticulated rationale that when one speaks he takes the risk that his intended listener may subsequently testify as to the contents of the conversa-

tion. Such a risk, although perhaps the product of a "misplaced confidence," is reasonably foreseeable, and thus objection thereto is waived. Another risk taken by a speaker is outlined in *Rathbun* v. *United States*, 355 U.S. 107 (1957).[7] In that case, the Court determined that on a constructive knowledge theory it is not unreasonable to say that one who places a telephone call takes the risk that an extension on the other end of the line may be picked up by an uninvited third party with or without the complicity of the intended listener.[8] The focal point in determining the existence of a speaker's fourth amendment rights must be whether his activity was directed at keeping his statements private and what were the risks of overhearing which he should have justifiably anticipated at the time of his statements.[9] In deciding whether the defendant waived his fourth

---

[7] To the extent that *Rathbun* is based on the one party consent theory, it is inconsistent with the broad ruling of *Katz*. We view it from the speaker risk point of view for purposes of our present discussion.

[8] It is important for courts deciding fourth amendment questions to take into account the relationship between that amendment and the first amendment's penumbral protection of privacy. It is this nexus which makes a speaker risk analysis appropriate. If the law places great risks of governmental intrusion on an individual's activity, especially his private speech, he will be inhibited in the free exercise of his first amendment rights, that is, the broader the scope of governmental searches and seizures which are determined to be consistent with the fourth amendment, the narrower the ambit of protected first amendment activity will become. This important interrelationship is detailed in GREENAWALT, *The Consent Problem in Wiretapping & Eavesdropping: Surreptitious Monitoring with the Consent of a Participant in a Conversation*, 68 COLUM. L. REV. 189 (1968).

[9] This court, speaking through Judge Hastings, recently recognized a substantially similar inquiry: "One who intends a conversation or transaction to be private and takes reasonable steps to keep it private is protected from government intrusion unauthorized by warrant or well-defined special circumstances." *United States* v. *Haden*, 397 F.2d 460, 465 (7th Cir. 1968).

ment agents were made because they recognized that the defendant sought to exclude their uninvited ears. Why else would they have hired informer Jackson, placed upon his person a hidden radio transmitter, and concealed agent Jackson in the informer's kitchen closet to overhear the defendant's conversation? Additionally, the locations chosen for the private conversations indicate that the defendant took reasonable steps to protect against governmental intrusion. In such a situation we can only conclude that the defendant's fourth amendment rights were violated,[12] that the failure to suppress the evidence of his statement was error, and that their admission at trial constituted ground for reversal.[13]

Although the Government has cited numerous cases to support its position, they are inapposite. Unlike the case before us, *Hoffa* v. *United States,* 385 U.S. 293 (1966), and *Lewis* v. *United States,* 385 U.S. 206 (1966), presented situations where there was no electronic interception or transmission of the defendants' statements. They stand for the proposition that an in-

---

[12] According to the language in *Katz,* "[T]he Government's activities in electronically listening to and recording the petitioner's words violated the privacy upon which he justifiably relied . . . and thus constituted a "search and seizure' within the meaning of the Fourth Amendment." *Id.* at 353. The assessment made by the Court regarding *Katz* is equally applicable to the defendant White: "[He] surely is entitled to assume that the words he utters . . . will not be broadcast to the world." *Id.* at 352.

[13] Other courts have reached an identical conclusion in light of the *Katz* decision. *E.g., Doty* v. *United States* F.2d , 3 Crim.L.R. 2220 (10th Cir. 1968), decision on rehearing pending; *United States* v. *Jones,* F.Supp. , 3 Crim.L.R. 3007 (D.D.C. 1968). *Contra, Dancy* v. *United States,* 390 F.2d 370 (5th Cir. 1968) (Fahy, J., sitting by designation from the D.C. Cir., dissenting). Other circuits which have faced the issue here presented such as the Second Circuit in *United States* v. *Jackson,* 390 F.2d 317 (2d Cir. 1968), and the Ninth Circuit in *Jack* v. *United States,* 387 F.2d 471 (9th Cir. 1967), voiced their opinion before the Supreme Court's adjudication of *Katz.*

former is a competent witness as to conversations and dealings with a defendant. Looked at from the viewpoint of the speaker, these cases demonstrate that a person confiding in another takes the risk that the confidence may be misplaced and that the confidant may memorize or record the statements and repeat them at trial. That risk and the applicable rule provide no guidance for the present problem.

Likewise, *Rathbun* v. *United States,* 355 U.S. 107 (1957), a consensual overhearing case not decided on a constitutional basis, involved the assumption of a risk by the defendant that operated as a waiver of his fourth amendment protection. The holdings of *Rathbun* and this court's decision in *Williams* v. *United States,* 311 F.2d 721 (7th Cir.), *cert. denied,* 374 U.S. 812 (1963), do not settle the question before us and are of no benefit to the Government.

Lopez v. *United States,* 373 U.S. 427 (1963), has factual features which distinguish it from the instant case. In *Lopez* a concealed device on the person of an undercover agent recorded a conversation between him and the defendant. Admission in evidence of the recording itself to corroborate the undercover agent's testimony was upheld in the circumstances of the case. The important distinction between *Lopez* and this case is that here the informer, Harvey Jackson, was not produced as a witness whereas in *Lopez* the Government agent was a witness. *Lopez* goes no further than to hold that where an informer testifies as to conversations with a defendant, a recording of such conversations is admissible for the limited purpose of corroboration.

In *Osborn* v. *United States,* 385 U.S. 323 (1966), a Government informer recorded conversations between himself and the defendent for the purpose of corroborating his allegations that the defendant was endeavoring to employ him to bribe a prospective juror. Al-

though the case involved monitoring with the consent of the informer, there was proper judicial approval of the reasonableness of the recording.

The Goverment's principal reliance is placed on the decision in *On Lee* v. *United States,* 343 U.S. 747 (1952). There an electronic device which transmitted two conversations between an agent and the defendant, one of which took place in the defendant's laundry and the other a few days later on the street, was concealed on the body of an undercover agent. On each occasion the transmitted conversation was heard by a government agent stationed nearby with a receiving device. The agent's testimony as to what he had heard was held admissible over the defendant's contention that the informer was a trespasser and that hence the seizure was proscribed by the fourth amendment. On its facts, *On Lee* is directly in point and would control the disposition of this case if *Katz* had not supervened and if the Supreme Court had not on other occasions completely eroded the decisional basis of *On Lee.*

The recent treatment of the *On Lee* doctrine indicates that it now stands on unfirm ground. Not only did four members of the Supreme Court disagree with *On Lee* when it was decided, but also in *Lopez,* the majority pointed out that *On Lee* was of no help to the defendant. The Chief Justice, in his concurring opinion, was careful to make plain that he could not join in any implication that the majority was accepting the continued vitality of *On Lee.*[14]

---

[14] Chief Justice Warren said: "Since I agree with Mr. Justice Brennan that *On Lee* was wrongly decided and should not be revitalized, but base my views on grounds different from those stated in the dissent, I have chosen to concur specially." *United States* v. *Lopez,* 373 U.S. at 441.

Justice Brennan, joined by Justices Douglas and Goldberg, stated in dissent: "The Court's refusal to accord more than passing mention in its opinion to the only decision of this Court—*On Lee*

The most lethal blow to *On Lee* was dealt by the Court's overruling in *Katz* of the *Goldman* and *Olmstead* bulwark which had provided the conceptual basis for *On Lee*.[15] The overruling of these cases combined with the reasoning of *Katz* leaves no scope for *On Lee's* teaching. For these reasons, *On Lee* cannot be the foundation of our decision.

On the basis of the constitutional principles set forth in *Katz* and our understanding of the protection which the fourth amendment was drawn to provide, we are of the opinion that the surreptitious monitoring of the defendant's conversations was a naked violation of his rights and that the resultant seizure of his statements was not made in conformity with the provisions of that amendment.[16]

In view of our disposition of this issue we find it unnecessary to consider the other alleged errors presented by the defendant.

Accordingly, we adhere to our previous decision reversing the judgment of the district court and remand the case for a new trial.

CASTLE, *Chief Judge*, with whom Circuit Judges Hastings and Fairchild join, dissenting. I find myself unable to agree that the decisional basis of *On Lee* has

—factually analogous to the case at bar suggests very strongly that some of my colleagues who have joined the Court's opinion today agree with us that *On Lee* should be considered a dead letter. For the Court, rather than follow *On Lee*, has adopted the substance of the Government's attempted distinction between *On Lee* and the instant case." *Id.* at 447.

[15] For further discussion see p. 7, *supra*.

[16] The present decision overrules our prior determinations pertaining to the admissibility of statements seized in situations similar to those presented here. *E.g.*, *United States* v. *Pullings*, 321 F.2d 287, 295 (7th Cir. 1963), and *United States* v. *Vittoria*, 284 F.2d 451, 455 (7th Cir. 1960), wherein we held that by consent an individual can waive another party's fourth amendment rights.

been eroded to the extent that the electronic monitoring of the defendant's conversations with the informer, with the latter's consent, must now be regarded as constituting an unreasonable search and seizure in violation of the Fourth Amendment. The majority opinion recognizes that on its facts *On Lee* is directly in point and would control the disposition of this case unless its teaching is to be completely rejected. I join with Justice White in regarding *On Lee* as "undisturbed" by the decision in *Katz*. (Concurring opinion, *Katz* v. *United States,* 389 U.S. 347, 363, n. (1967)).

Although a substantial part of the rationale of *On Lee* has arguably been discredited in later cases[1], the case was cited with approval in *Lopez* v. *United States,* 373 U. S. 427, 438 (1963) and in *Katz* v. *United States,* 389 U. S. 347, 363 (1967) (Concurring opinion of Justice White).

The Government's use of conversations obtained by the deception of a Government agent has been dealt with in numerous cases, and the validity of such conduct has consistently been upheld where the conversation was freely entered into by the defendant.

Thus, in *Lopez* v. *United States,* 373 U. S. 427, 439 (1963), the Supreme Court held that the recording made by a Government agent of a bribe offer was properly admitted into evidence. Since the agent was entitled to, and did, testify about the conversation he had with the defendant, there was no "seizure" of anything without the defendant's knowledge and consent when he voluntarily participated in the incriminating conversation. The recording device, therefore, was used

[1] *E.g., Warden* v. *Hayden,* 387 U. S. 294, 304 (1967): "The premise that property interests control the right of the Government to search and seize has been discredited." *Cf. Katz* v. *United States,* 389 U.S. 347, 353 (1967), *Silverman* v. *United States,* 365 U.S. 505 (1961); *Wong Sun* v. *United States,* 371 U. S. 471 (1963).

only to obtain the most reliable evidence possible of a conversation which the Government rightfully heard through its agent. Moreover, the case involved "no eavesdropping whatever in any proper sense of that term. The Government did not use an electronic device to listen in on conversations it could not otherwise have heard." 373 U. S. at 439. It followed that there was no search and seizure which violated the Fourth Amendment.

Even more recently decided were *Lewis* v. *United States,* 385 U. S. 206 (1966), and *Hoffa* v. *United States,* 385 U. S. 293 (1966). In *Lewis,* the Court held that where the defendant invited a person, who was a secret Government agent, into his house for the purpose of selling narcotics to the agent, the subsequent admission into evidence of the narcotic bought by the agent and the conversations which had taken place between the parties did not violate the Fourth Amendment since the agent took nothing which the defendant had not voluntarily given to him, and the deception did not nullify the defendant's consent.

In *Hoffa,* the Court held that no violation of the Fourth Amendment occurred when an acquaintance of defendant, whom defendant had invited to his hotel suite, heard conversations directed to him or to others in his presence. Unknown to defendant the acquaintance was a paid Government informer. Holding that this was merely a case of "misplaced confidence" rather than unreasonable search and seizure, the Court noted that "[n]either this Court nor any member of it has ever expressed the view that the Fourth Amendment protects a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it." (Citing Lopez). 385 U. S. at 302.

Taken together, these cases establish the principle that one who voluntarily enters into a conversation with

another takes the risk that such person may memorize, record, or (including *On Lee*) transmit the conversation.[2] It seems reasonable to conclude that if the recording in *Lopez* was not "eavesdroping," because it was done with the consent of one of the participants, and therefore not an unreasonable search and seizure, then a transmission is likewise not prohibited by the Fourth Amendment. Absent statutory prohibition, there is no legal significance in the fact that in one case, the transmission, a person is simultaneously overhearing the conversation with the consent of one of the participants while in the other a machine is employed to record such conversation for future disclosure. Therefore, I perceive no distinction which would require different treatment for purposes of the Fourth Amendment.

I do not read the recent decision in *Katz* v. *United States,* 389 U. S. 347 (1967) as changing the law as expressed in the cases just discussed. Nor do I view the decision in *Katz* as extending to the degree ascribed to it by the majority. In *Katz,* the Court reversed a conviction based upon one side of a telephone conversation overheard by Government agents by means of an electronic eavesdropping device installed on the public telephone booth in which defendant placed his call. The Court held that:

> "... the Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not subject to Fourth Amendment protection. See *Lewis* v. *United States,* 385 U. S. 206, 210; *United States* v. *Lee,* 274 U. S. 559, 563. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected. . . ." 389 U. S. at 351-352.

---

[2] It is important to note that, as in the instant case, there was no search warrant or court order in *Lopez, Lewis,* or *Hoffa.*

The use of this language by the Supreme Court illustrates the distinction between *Katz* and the instant case, and demonstrates the present state of the law. In *Katz,* the Government surreptitiously overheard one side of a conversation without the consent of either party thereto, and after the defendant had taken reasonable steps to protect his privacy. The Court, therefore, held that "[t]he Government's activities in electronically listening to and recording the petitioner's words violated the privacy upon which he justifiably relied while using the telephone booth and thus constituted a 'search and seizure' within the meaning of the Fourth Amendment." 389 U. S. at 353.

Unlike *Katz,* the instant case involves not a search and seizure, but a misplaced confidence—not surreptitious eavesdropping, but merely the obtaining of evidence of a conversation in which the Government, through its informer, was a participant. See *Lopez* v. *United States,* 373 U. S. 427, 439 (1963). Had the person on the other end of the telephone line in *Katz* allowed a Government agent to listen in on the conversation, there would have been no constitutional violation. *Rathbun* v. *United States,* 355 U. S. 107, 111 (1957); *United States* v. *Williams,* 311 F. 2d 721, 725 (7th Cir. 1963), cert. den. 374 U. S. 812 (1963). Thus, once the conversation is deprived of its private character through the consent of one of the parties thereto, the Fourth Amendment, not having prohibited the initial exposure, does not prohibit the introduction into evidence of the conversation as transmitted or recorded. As stated in *Katz,* itself, "what a person knowingly exposes to the public, *even in his own home or office,* is not subject to Fourth Amendment protection. See *Lewis* v. *United States,* 385 U. S. 206, 210. . . ." 389 U. S. at 351 (emphasis added).

Thus, any expectation, by defendant, of privacy, when the person to whom the defendant is speaking consents to exposure of the conversation is not reasonable and therefore not protected by the Fourth Amendment. This Court recently pointed out the distinction between electronic eavesdropping and misplaced confidence in *United States* v. *Haden,* 397 F. 2d 460 (7th Cir. 1968), where we held (at page 465):

> "One who intends a conversation or transaction to be private and takes reasonable steps to keep it private is protected from Government intrusion unauthorized by warrant or well-defined special circumstances. Cf. *Katz* v. *United States,* 389 U. S. 347 (1967). But he is not protected from the consequences of error, if he places trust in the silence, duplicity or complicity of a Government agent or informer."

Therefore, the application of *Katz* to the instant case is its recognition of the principle that:

> "When one man speaks to another he takes all the risks ordinarily inherent in so doing, including the risk that the man to whom he speaks will make public what he has heard. The Fourth Amendment does not protect against unreliable (or law-abiding) associates. *Hoffa* v. *United States, supra.* It is but a logical and reasonable extension of this principle that a man take the risk that his hearer, free to memorize what he hears for later verbatim repetition, is instead recording it or transmitting it to another. The present case [*Katz*] deals with an entirely different situation, for as the Court emphasizes, the petitioner "sought to exclude . . . the uninvited ear," and spoke under circumstances in which a reasonable person would assume that unin-

vited ears were not listening." *Katz* v. *United States,* 389 U. S. 347, 363 n. (1967) (Concurring opinion of Justice White) (Emphasis supplied).[3]

In concluding that the Fourth Amendment does not prohibit the transmission of a conversation to a Government agent by a participant therein, where the defendant is a voluntary party to the conversation, I am mindful of the fact that, as recognized in numerous Supreme Court decisions,[4] as well as our own,[5] the strategem of deception is often the only way the Government can obtain information relating to a crime. To prohibit the use of such deceit might, in certain areas, prevent effective law enforcement. The Supreme Court in *Lewis* v. *United States,* 385 U. S. 206, at 210-211 (1966), cited with approval a quotation from the Model Penal Code § 2.10, comment, p. 16 (Tent. Draft No. 9, 1959):

> "Particularly, in the enforcement of vice, liquor or narcotics laws, it is all but impossible to obtain evidence for prosecution save by the use of decoys. There are rarely complaining witnesses. The participants in the crime enjoy themselves. Misrepresentation by a police officer or agent concerning the identity of the purchaser of illegal narcotics is a practical necessity. . . . Therefore, the law must attempt to distinguish between those deceits and persuasions which are permissible and those which are not."

---

[3] Justice White, in the same footnote, alsc cited *Hoffa, Lopez* and *On Lee* as cases "which are undisturbed by today's decision."

[4] *E.g., Lewis* v. *United States,* 385 U.S. 206, 208-211 (1966); *Sorrells* v. *United States,* 287 U. S. 435, 411-442 (1932); *Andrews* v. *United States,* 162 U. S. 429, 423 ((1896).

[5] *E.g., United States* v. *Haden,* 397 F.2d 460 (7th Cir. 1968); *United States* v. *Lauchli,* 371 F.2d 303 (7th Cir. 1966); See also *Cellino* v. *United States,* 276 F.2d 941 (9th Cir. 1960).

For the reasons stated above, I am of the view that the method of deception employed in the instant case is constitutionally permissible and is not so fundamentally unfair as to require reversal in the exercise of our supervisory power over the district court. Rather than being of an indiscriminate nature, as in *Berger* v. *New York,* 388 U. S. 41 (1967), *Katz* v. *United States,* 389 U. S. 347 (1967), and *Silverman* v. *United States,* 365 U. S. 505 (1961), the electronic transmission in the instant case included only those words which defendant voluntarily spoke to the informer and intended that he hear, thus knowingly taking the risk that the informer would disclose them to the Government.

Such view does not, therefore, approve or permit violation of the "requirements of the Fourth Amendment in the name of law enforcement," as *Berger* forbids (388 U. S. at 62), but rests on a conclusion compelled by an analysis of those decisions in which the Supreme Court has to date considered the subject matter.

HASTINGS, *Circuit Judge,* dissenting. I join Chief Judge Castle in his able dissent in this case. I wish to add a few brief comments of my own.

I was moved to vote for a rehearing *en banc* in the instant *White* case because I thought the majority opinion, written by the late Judge Schnackenberg, mistakenly relied upon *Katz* v. *United States,* 389 U. S. 347 (1967), as its authority for a reversal of the judgment of conviction. I thought at that time, as I do now, that the factual situation in *Katz* is so unlike the present case before us as to furnish no controlling precedent.

The original panel opinion was handed down in slip opinion form on March 18, 1968. Judges Major and Schnackenberg were in the majority, with Chief Judge Castle in dissent. It is conceded in the present *en banc*

majority opinion that the author of the prior panel majority decision was of the view that the rationale of *Katz* required a reversal of White's conviction. Yet that is precisely the same position taken by Judge Swygert in the instant majority opinion. Why was it necessary to indulge in this exercise in semantics to reach the same result on the same cited authority?

I concede that Judge Swygert's majority opinion is a sophisticated constitutional essay in contrast to the short direct approach taken by Judge Schnackenberg. But therein may lie a present danger. With deference, I suggest that the present majority has undertaken a broad construction of *Katz* that was not taken by the Supreme Court. For a stimulating treatment of the subject I recommend the reading of *Katz* v. *United States*: The Limits of The Fourth Amendment, by Edmund W. Kitch, Associate Professor of Law, The University of Chicago.[1]

My final comment is directed to the rather summary reversal of *On Lee* v. *United States,* 343 U. S. 747 (1952), by the majority here. Chief Judge Castle has ably covered this in his dissent. My fundamental objection to the majority mistreatment of *On Lee* is that it has no authority to do what it did. I have long held the rather old fashioned view that only the Supreme Court could set aside its holdings. By the process of taking a head count and making a guess on what the Court may do at some future time, the majority holds: "On its facts, *On Lee* is directly in point and would control the disposition of this case if *Katz* had not supervened and if the Supreme Court had not on other occasions completely eroded the decisional basis of *On Lee.*"

---

[1] Released a few days ago by The University of Chicago Press, as a chapter in The Supreme Court Review, 1968, pp. 133-152, edited by Professor Philip B. Kurland.

I make no prophecy on the future of *On Lee*. Until it is set aside by the Supreme Court, I regard it as controlling and dispositive of the present appeal. I would affirm the judgment of conviction.

A true Copy:

Teste:

____, ____,

Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Chicago, Illinois 60604

Tuesday, January 7, 1969

Before: Hon. LATHAM CASTLE, Chief Judge, Hon. J. EARL MAJOR, Senior Circuit Judge, *Hon. ELMER J. SCHNACKENBERG, Circuit Judge, Hon. JOHN S. HASTINGS, Circuit Judge, Hon. ROGER J. KILEY, Circuit Judge, Hon. LUTHER M. SWYGERT, Circuit Judge, Hon. THOMAS E. FAIRCHILD, Circuit Judge, Hon. WALTER J. CUMMINGS, Circuit Judge, Hon. OTTO KERNER, Circuit Judge.

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*

vs.

JAMES A. WHITE, *Defendant-Appellant.*

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division, on rehearing *en banc.*

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is

---

* Although Judge Schnackenberg participated in the en banc rehearing, he died prior to the adoption of this opinion. As author of the prior panel decision of this court, he was of the view that the rationale of Katz v. United States, 389 U.S. 347 (1967) required reversal of White's conviction.

hereby, REVERSED, and that this cause be, and it is hereby REMANDED to the said District Court for a new trial, in accordance with the opinion of this Court filed this day.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1989—232-217/488

FILE COPY

FILED
MAR 7 1969
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1968.

No. 13

UNITED STATES OF AMERICA,
Petitioner,

v.

JAMES A. WHITE,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

BRIEF FOR JAMES A. WHITE IN OPPOSITION.

MORRIS A. SHENKER,
JOHN L. BOEGER,
408 Olive Street,
St. Louis, Missouri 63102,
Attorneys for James A. White.

Of Counsel:
CHAUNCEY ESKRIDGE,
123 West Madison,
Chicago, Illinois.

St. Louis Law Printing Co., Inc., 411-15 N. Eighth St., 63101. CEntral 1-4477.

INDEX.

	Page
Opinions below	1
Jurisdiction	2
Questions Presented	2
Statement	3
Argument	6
1. The record below and the Court of Appeal's opinion does not support the government's contention that the informant consented to the illegal eavesdropping	6
2. Respondent's Fourth Amendment rights were infringed when government agents electronically and surreptitiously intercepted his private conversations without prior judicial approval and in violation of State criminal laws	8
Conclusion	14

CITATIONS.

Cases:

Agnello v. United States, 269 U. S. 20	10
Aguilar v. State of Texas, 378 U. S. 108	10
Berger v. New York, 388 U. S. 41	8, 11, 12
Bumper v. State of North Carolina, 88 S. Ct. 1788, 1792	6
Elkins v. United States, 364 U. S. 206	12
Fountain v. United States, 384 F. 2d 624 (C. A. 5)	7
Goldman v. United States, 316 U. S. 129	11

Handsford v. United States, 390 F. 2d 373 (C. A. 5) 7
Hoffa v. United States, 385 U. S. 293 9
Katz v. United States, 389 U. S. 347 .....3, 5, 7, 8, 9, 10, 11, 12, 13
Lewis v. United States, 385 U. S. 206 9
Long v. United States, 387 F. 2d 377 (C. A. 5)..... 7
Lopez v. United States, 373 U. S. 427 .....10, 12
Olmstead v. United States, 277 U. S. 438, 485 ....11, 12
On Lee v. United States, 343 U. S. 747 11
Osborn v. United States, 385 U. S. 323 .....8, 11
People v. Kurth, 34 Ill. 2d 387, 216 N. E. 2d 154 ... 12
Rios v. United States, 364 U. S. 253 12
United States v. Jackson, 390 F. 2d 317 (C. A. 2)... 7
United States v. Jeffers, 342 U. S. 48, 51 .....10, 11
United States v. Jones, D. C., 292 F. Supp. 1001, 1008 7
United States v. Kaufer, 4 Cr. L. Rep. 2333 (No. 32692, C. A. 2, decided Jan. 14, 1969)..... 7
United States v. Lefkowitz, 285 U. S. 452 10
United States v. Leighton, 386 F. 2d 822 (C. A. 2).. 7
United States v. Rivera, 321 F. 2d 704 (C. A. 2)... 11
Weeks v. United States, 232 U. S. 383 10
Wong Sun v. United States, 371 U. S. 471 .....10, 11

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1968.

No. 1024.

UNITED STATES OF AMERICA,
Petitioner,

v.

JAMES A. WHITE,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

BRIEF FOR JAMES A. WHITE IN OPPOSITION.

OPINIONS BELOW.

The Opinion of the Court of Appeals (Pet. App. A, pp. 7-15[1] and its opinion on rehearing *en banc* (Pet. App. B, pp. 16-41) are not yet reported.

[1] "Pet. App." references are to the Appendix, attached to the government's petition for writ of certiorari.

JURISDICTION.

The judgment of the panel of the Court of Appeals was entered on March 18, 1968. The government's petition for rehearing *en banc* was granted, and the *en banc* judgment of the Court of Appeals (Pet. App. C, p. 42) was rendered on January 7, 1969. Respondent denies that this Court has jurisdiction to review the judgment rendered by the Court of Appeals on January 7, 1969 for reasons set forth in his Argument, *infra*.

QUESTIONS PRESENTED.

1. Whether respondent's Fourth Amendment rights, protecting him against governmental intrusion by unreasonable search and seizure, were infringed when government narcotic agents electronically and surreptitiously intercepted his private conversations without prior judicial approval and in violation of State criminal laws.

2. When the government seeks to rely upon consent of one party to a conversation to justify the lawfulness of an electronic search, does the government sustain its burden of proving that the alleged consent was freely and voluntarily given by merely showing that the person was "cognizant" of the eavesdropping?

3. Does the spirit of federal protection against double jeopardy preclude government petitioning of Federal Appellate Court for rehearing *en banc* of panel decision reversing defendant's conviction, especially where the rules of the Court of Appeals do not specifically provide for such a rehearing?

STATEMENT.

The government's statement in its petition for writ of certiorari is clearly erroneous. The government states that the informant **consented** to the government's illegal electronic eavesdropping (Pet. 3).[2] Such contention is not supported by the record or by the Court of Appeal's decisions. For that reason, respondent herein sets forth portions of the Court of Appeal's opinion first rendered in this case which summarizes the facts as follows:

> "Defendant [respondent] was convicted of the possession and sale of narcotics largely as a result of the testimony of federal narcotics agents that they heard defendant make self-incriminating statements, which had been transmitted over the air by an electronic device hidden under the informer's clothes. Thereby, the agents heard conversations taking place in the defendant's home, his car, his place of business, as well as in the informer's house and car. The evidence clearly shows that by these means government agents were able to, and did, testify to what they thus heard, including admissions by defendant. **Informer Jackson did not testify at the trial.** There is no contention that the government relied on any warrant or Court Order" (Pet. App. A, pp. 11-12. Emphasis added).

A panel of the Court of Appeals reversed the conviction, applying the principles announced by this Court in **Katz v. United States,** 389 U. S. 347, and held that the Federal Agents were required to obtain a search warrant before

---

[2] The government's attempt to supplement the record by trying to leave the impression with this Court that the informer gave his consent to the government to electronically eavesdrop is evidenced by the fact that said contention is made by the government at least twice on page two of its petition ("Questions Presented"), three times on page three, once on page four, and once on page five.

using electronic means to overhear respondent's conversations with the secret informant. The panel of the Court of Appeals did not remand the case for a new trial (Pet. App. A, pp. 14-15). Also, nowhere in the majority opinion by the panel of the Court of Appeals does it state that the secret informant consented to the government's illegal electronic eavesdropping.

The government filed a petition for rehearing *en banc* in the Court of Appeals, however, the government did not specifically argue that the Court of Appeals erred in its statement of the pertinent facts in the case. Respondent's reply brief that was filed in the Court of Appeals brought to the Court's attention that the government did attempt to supplement the record by trying to leave the impression with the Court that the secret informer gave his consent to the government to electronically eavesdrop on the illegally overheard conversations. Respondent stated at page 3 of his reply brief as follows:

> "Indeed, the government cites no page references to the record showing that the informant 'consented' to having the Kel set placed upon his person. Contrariwise, the government gives three citations to the record where government agents concluded that the informant gave them 'permission' to listen to one telephone conversation. Further, during oral argument before this Court, government counsel begrudgingly admitted that the record did not support a contention that the informant 'consented' to having the Kel set placed upon his person."

Respondent in his reply brief also brought to the Court of Appeal's attention the fact that the trial Court unreasonably limited the cross-examination by defense counsel of government agents concerning the government's relationship with the secret informant. This particular issue was raised in respondent's original brief in the Court of

Appeals, but the Court of Appeals found it unnecessary to consider said issue.

The Court of Appeals *en banc* held that the conviction must be reversed, but remanded the case for new trial (Pet. App. B, p. 32). The Court of Appeals did not hold that the secret informant consented to the government's illegal eavesdropping, but held that "one party to the monitored conversation, informer Jackson, was cognizant of the Government's eavesdropping activities" (Pet. App. B, p. 23). The Court of Appeals held that consent was without decisional significance and that a third person could not waive a speaker's (respondent's) Fourth Amendment rights. Thus, the Court below made no determination regarding whether the informant consented. The Court stated:

> "In holding that the rationale of **Katz** applies regardless of whether one party to a private conversation consents to the Government's interception of the conversation, we do not purport to make any determination regarding the voluntariness of informer Jackson's participation in the agents' scheme. Since it is our view that a listener's consent is irrelevant, it is difficult to see how informer Jackson's conduct, whether the product of coercion or consent, could have constituted a waiver of the defendant's constitutional rights. Only his own consent could have created such a waiver. The rationale of **Katz** permits no other conclusion" (Pet. App. D, p. 24).

ARGUMENT.

1. The record below and the Court of Appeal's opinion does not support the government's contention that the informant consented to the illegal eavesdropping.

The thrust of the government's petition for certiorari, including its "Questions Presented" relies upon a false premise, to-wit: that the informant **consented** to the government's illegal electronic eavesdropping. As shown in respondent's Statement, *supra,* the record in this case does not confirm the government's contention that the informant consented to anything. Not only does the government fail to cite in its petition one page reference to the record supporting its contention, but the Court below never held that consent was given. The opinion of the Court of Appeals sitting *en banc* merely states that the informant was "cognizant" of the eavesdropping (Pet. App. B, p. 23). The Court below did not make a determination regarding the voluntariness of the informant's participation in the government agent's scheme to illegally eavesdrop upon respondent's private conversations.

Thus, assuming *arguendo* that "consent" is material to the issues in this case, the record does not support the government's contention that the informant did consent to the illegal search. Further, the government had the burden of proving at trial that the informant voluntarily consented to the illegal eavesdropping. **Bumper v. State of North Carolina,** 88 S. Ct. 1788. In **Bumper,** this Court held:

> "When a prosecutor seeks to rely upon consent to justify the lawfulness of a search, he has the burden of proving that the consent was, in fact, freely and voluntarily given. This burden cannot be discharged by showing no more than acquiescence to a claim of lawful authority." **Bumper v. State of North Carolina,** 88 S. Ct. 1788, 1792.

Clearly, the mere knowledge by the informant that a radio device was attached to his person does not sustain the government's burden of proving voluntary consent. "Consent, as a matter of law, means more than a willingness to cooperate or a formal document expressing consent." **United States v. Jones**, D. C., 292 F. Supp. 1001, 1008.[3]

Certiorari should be denied in this case for the reason that the questions presented by the government rely upon facts and circumstances that are not present here, to-wit: voluntary consent by one of the parties to the illegally overheard conversations.

Additionally, there is no conflict between the opinion in this case and the decisions of the Second and Fifth Circuits cited by the government (Pet. pp. 3-4). As stated by the government, those cases hold that **Katz v. United States**, 389 U. S. 347, "does not apply to situations where one party has consented to have his conversation electronically monitored" (Pet. p. 3). Here, the government did not prove consent, therefore all the cases cited by the government are inapplicable and are not in conflict with the instant opinion. Further, the informants testified in the cases relied upon by the government. See, **United States v. Kaufer**, 4 Cr. L. Rep. 2333 (No. 32692, C. A. 2, decided Jan. 14, 1969); **Fountain v. United States**, 384 F. 2d 624 (C. A. 5); **Handsford v. United States**, 390 F. 2d 373 (C. A. 5); **United States v. Leighton**, 386 F. 2d 822 (C. A. 2); **United States v. Jackson**, 390 F. 2d 317 (C. A. 2); **Long v. United States**, 387 F. 2d 377 (C. A. 5).

---

[3] In **Jones**, the informant did sign a written consent to the monitoring and the government advised the trial Court of its intention to use the intercepted conversations merely as corroboration of the informant's testimony. The Court suppressed the recordings. The Court relied upon this Court's opinion in **Katz v. United States**, 389 U. S. 347 and the Seventh Circuit Court of Appeal's first decision in the instant case.

Thus, the government cites no case which is in conflict with the decision in this case.

2. **Respondent's Fourth Amendment rights were infringed when government agents electronically and surreptitiously intercepted his private conversations without prior judicial approval and in violation of State criminal laws**

Assuming *arguendo* that the record in this case establishes that the informant did, in fact, freely and voluntarily consent to the unlawful eavesdropping, respondent submits that this Court should deny certiorari for the reason that it has previously held that "consent" by an informant is not controlling in this type of case. In **Osborn v. United States,** 385 U. S. 323, the informant **consented** to the use of the electronic device, but this Court held that the "indiscriminate use of such devices in law enforcement raises grave Constitutional questions under the Fourth and Fifth Amendments . . ." 385 U. S. at 329. The **Osborn** decision has been quoted and cited with approval in **Berger v. State of New York,** 388 U. S. 41, 57, and in **Katz v. United States,** 389 U. S. 347, 355. Nowhere in the **Osborn, Berger** or **Katz** cases did this Court conclude that "consent" was material or determinative of the issues raised therein.

As stated in the opinion below, "the surreptitious placing of the kel set on informer Jackson was for all conceptual purposes the same as the surreptitious wiring of the telephone booth in **Katz**" (Pet. App. B, pp. 23-24). The electronic eavesdropping in **Katz** and in this case were both part of a "bugging" technique by which the conversations were transmitted to an "uninvited ear", to-wit, government narcotics agents. The critical and determinative factor in both cases was that the respective speakers did not consent to the overhearing of their state-

ments and same were unlawfully overheard by third persons (government agents), uninvited by the speaker.

The government, citing the following sentence from the opinion in **Katz** attempts to distinguish **Katz** from the facts in this case. "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." 399 U. S. 351. However, the government fails to quote the next sentence in the **Katz** opinion which states: "**But what he seeks to preserve as private,** even in an area accessible to the public, may be constitutionally protected" (389 U. S. at 351, emphasis added). Here, the record clearly shows and the Court below specifically found, that the **respondent justifiably expected his conversations to be private** (Pet. App. B, p. 28). The Court below also found that the government agents recognized that the respondent sought to exclude their uninvited ears.

The government's interpretation of **Katz, Hoffa v. United States,** 385 U. S. 293, and **Lewis v. United States,** 385 U. S. 206, is that whenever a person speaks to a third person (even in one's own home), that third person can legally waive the speaker's Fourth Amendment rights and surreptitiously broadcast his words to the world. Thus, the government will deny a speaker's (unless he talks to himself) Fourth Amendment rights if a third person wants to surreptitiously waive his rights for him. The government claims that this waiver by a third party should be allowed without any judicial safeguards.

The decisions in **Lewis** and **Hoffa** are inopposite for those cases presented situations where there was no electronic interception or transmission of the defendant's words. Those cases merely hold that an informant is a competent witness to conversations and dealings with a defendant. Of course here, the informant never testified, but the goverment did electronically intercept and transmit the defendant's private conversations.

The decision below does not suggest that this Court's decision in **Katz** overruled **Lopez v. United States**, 373 U. S. 427. The facts in **Lopez** are distinguishable to the facts here. First, **Lopez** concerned the attempted bribery of a government agent, **known** to the defendant to be a government agent. Second, the same government agent who recorded defendant's conversation testified at trial. Here, the secret informer never testified. Third, in **Lopez** there was no transmission over the air of defendant's voice (only a recorder worked properly). Here, defendant's voice was transmitted over the air to be heard not only by government agents, but by anyone else who happened to be tuned in on that specified radio frequency.

The Fourth Amendment commands that there be a warrant, issued upon probable cause, supported by oath or affirmation, particularly describing the place to be searched and the persons or things to be seized. There was no warrant in the instant case. As in the **Katz** case,

> "The government agents here ignored 'the procedure of an antecedent justification . . . that is central to the Fourth Amendment' [citing **Osborn**, 385 U. S. 323, 330]; a procedure that **we hold to be a constitutional precondition of the kind of electronic surveillance involved in this case.**" **Katz v. United States**, 389 U. S. at 359 (emphasis added).

See also **Weeks v. United States**, 232 U. S. 383; **Agnello v. United States**, 269 U. S. 20; **United States v. Jeffers**, 342 U. S. 48; **United States v. Lefkowitz**, 285 U. S. 452; **Aguilar v. State of Texas**, 378 U. S. 108.

Additionally, the law is clear that the government has the burden of proving that its warrantless searches were conducted under exceptional circumstances and must show the need for the searches outside judicial process without prior approval by judge or magistrate before the government can validly claim an exemption. **Wong Sun**

v. United States, 371 U. S. 471; **United States v. Jeffers**, 342 U. S. 48, 51; **United States v. Rivera**, 321 F. 2d 704 (C. A. 2). Here, the government did not sustain its burden of proving that its warrantless search comes within the few exceptions set forth in **Katz**. Thus, there is no good reason for granting certiorari in this case.

In **Katz**, the government urged that because its agents relied on the decisions in **Olmstead v. United States**, 277 U. S. 438 and **Goldman v. United States**, 316 U. S. 129, which had been the law at the time of their acts, this Court should retroactively validate their conduct. That, this Court refused to do, even though the agents acted with restraint. 389 U. S. at 356. The government was bound by this Court's application of Fourth Amendment principles.

Similarly here, the government urges, in effect, that its agents must be judged by pre-**Katz** standards and that this Court similarly retroactively validate its conduct. This rationale should not be adopted here for the same reasons given by this Court in the **Katz** case.

Furthermore, the respondent emphatically states that even under those prior standards, the conviction below, as analyzed by the Court of Appeals, would necessarily have been reversed. The Court of Appeals' opinion conclusively establishes the invalidity of the questioned searches and seizures under Supreme Court cases decided prior to **Katz**. **Berger v. New York**, 388 U. S. 41; **Osborn v. United States**, 385 U. S. 323. In this regard, it should be noted that although the government relied principally upon the decision in **On Lee v. United States**, 343 U. S. 747, in the Court below (Pet. App. B, p. 31), the government seemingly does not put such stress on that decision now (Pet., p. 4). Respondent submits that this Court has never revitalized the **On Lee** decision and since that decision was based upon the trespass theory, **On Lee** was rightfully rejected by

this Court in **Berger, Lopez** and **Katz** and by the Seventh Circuit Court of Appeals in this case.

Another good reason why this Court should not retroactively validate the government agent's surreptitious eavesdropping is that it was done in contravention of Illinois State law. **People v. Kurth,** 34 Ill. 2d 387, 216 N. E. 2d 154. Thus, the agent's conduct was "manifestly improper" within the meaning of **Lopez v. United States,** 373 U. S. 427, 440. This Court should not condone anyone's intentional violation of law. **Elkins v. United States,** 364 U. S. 206; **Rios v. United States,** 364 U. S. 253. As stated in Justice Homes' dissent in **Olmstead v. United States,** 277 U. S. 438, 485, "if the government becomes a law breaker, it breeds contempt for law . . ."

3. **Lack of jurisdiction to review en banc decision of Court of Appeals.**

Respondent respectfully suggests that there is serious doubt whether this Court has jurisdiction to review the judgment rendered on January 7, 1969 by the Court of Appeals, sitting *en banc.* As contended by respondent in his reply brief filed in opposition to the Government's petition for rehearing *en banc,* respondent here urges that the opinion of the panel of the Court of Appeals rendered on March 18, 1968 was final for the reason that no authority existed at that time for the granting of a petition for rehearing *en banc* under the circumstances of this case and that to afford the government a right of review was contrary to the spirit of the Fifth Amendment's prohibition against double jeopardy.

The right of appeal is statutory and that of the government in a criminal proceeding is limited to the circumstances provided in Title 18, United States Code, Section 3731. Additionally, appeals by the government in criminal cases are something unusual, exceptional and not favored.

Carroll v. United States, 354 U. S. 394, 399-400. If the District Court had ruled initially as the Court of Appeals' opinion of March 18, 1968 said it should have ruled (sustain the motion to strike the evidence), it is clear that the government would not have been entitled to appellate review of such ruling at the time of said ruling. **Carroll v. United States,** 354 U. S. 394. The opinion of the panel of the Court of Appeals is entitled to the same degree of finality as is afforded a ruling of the District Court. This is so whether the right to review is limited by the Fifth Amendment or by the statutory restriction on the Government's appeals in criminal causes.[4]

The prejudice here to this respondent is clear for the reason that the judgment of the Court of Appeals sitting *en banc* remanded the case to the District Court for new trial, whereas, the orginal opinion and judgment of the **panel** of the Court of Appeals reversed the conviction without remanding the case for new trial (Pet. App. A, p. 15). Respondent submits that the original judgment of reversal was proper for the reason that this Court, in an almost identical situation reversed the judgment of conviction without remanding the case. **Katz v. United States,** 398 U. S. at 359.

We submit that this Court previously had jurisdiction to review the earlier judgment of reversal rendered by the panel of the Court of Appeals, but the government chose not to file a timely petition for certiorari in this Court to review that judgment. Since the filing of a petition for certiorari is jurisdictional and because the Court of Appeals did not have jurisdiction to grant the petition for rehearing *en banc* in the first place, this Court should not review the latter judgment entered by the Court of Appeals sitting *en banc.*

---

[4] In March 1968, the rules of the Seventh Circuit Court of Appeals provided for "rehearings," but did not provide for rehearings *en banc.* See Rule 25, Seventh Circuit Court of Appeals.

CONCLUSION.

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

MORRIS A. SHENKER,

JOHN L. BOEGER,
408 Olive Street,
St. Louis, Missouri 63102,
Attorneys for Respondent
James A. White.

Of Counsel:
CHAUNCEY ESKRIDGE,
123 West Madison,
Chicago, Illinois.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statement	2
A. The transactions overheard	3
1. The initial transaction (December 9, 1965) and the overhearings of two conversations in the informant's home	3
2. The second transaction (December 16, 1965) and the overhearing of a conversation in respondent's home on December 14, 1965	4
3. The third transaction (December 29, 1965) and the uncompleted fourth transaction	6
B. The trial	7
C. The decision of the court of appeals	8
Summary of argument	9
Argument:	
I. The agents' testimony as to statements made by respondent to an informant during narcotics transactions—which the agents overheard by means of a transmitter concealed on the informant with his consent—was properly admitted in evidence since the overhearing did not violate respondent's Fourth Amendment rights	12

354-282—69——1

Argument—Continued
I. The agent's testimony, etc.—Con.
A. The decision in *Katz* v. *United States* does not impose Fourth Amendment restrictions on the government's use of electronic devices to monitor conversations with the consent of one of the parties thereto ..... Page 13
B. The unavailability of the informant as a witness does not render inadmissible testimony concerning the conversations heard over the transmitter 24
II. Even if it is necessary under *Katz* v. *United States*, 389 U.S. 347, to obtain prior judicial approval for an informant to carry a transmitting device, the *Katz* decision should not be applied retroactively to this case 26
Conclusion 30

CITATIONS

Cases:
Brady v. *Maryland*, 373 U.S. 83 25
Dancy v. *United States*, 390 F. 2d 370 20
Desist v. *United States*, 394 U.S. 244 ..... 11, 27
Doty v. *United States*, Nos. 9031–9038, C.A. 10, decided June 4, 1968 20
Elkins v. *United States*, 364 U.S. 206 30
Fountain v. *United States*, 384 F. 2d 624, certiorari denied *sub nom. Marshall* v. *United States*, 390 U.S. 1005 20
Frazier v. *Cupp*, No. 643, 1968 Term, decided April 22, 1969 20
Handsford v. *United States*, 390 F. 2d 373, certiorari denied, 391 U.S. 915 20

Cases—Continued

	Page
Harris v. *United States*, 367 F. 2d 633, certiorari denied, 386 U.S. 915	28
Hoffa v. *United States*, 385 U.S. 293	9, 12, 14, 16, 17
Holt v. *United States*, 404 F. 2d 914	20
Jack v. *United States*, 387 F. 2d 471, certiorari denied, 392 U.S. 934	29
Johns v. *United States*, 323 F. 2d 421	29
Kaiser v. *New York*, 394 U.S. 280	27
Katz v. *United States*, 389 U.S. 347	2, 8, 10, 11, 12, 13, 16, 17, 20, 26, 27, 28, 29
Koran v. *United States*, 408 F. 2d 1321	20
Lewis v. *United States*, 385 U.S. 206	12, 14, 16, 17, 18, 24
Long v. *United States*, 387 F. 2d 377, certiorari denied, 390 U.S. 952	20
Lopez v. *United States*, 373 U.S. 427	9, 11, 12, 14, 15, 16, 18, 19, 21, 24, 25, 28
Marshall v. *United States*, 409 F. 2d 925	20
On Lee v. *United States*, 344 U.S. 747	25, 28
Osborn v. *United States*, 385 U.S. 323	23
People v. *Dixon*, 22 Ill. 2d 513, 177 N.E. 2d 224, certiorari denied, 368 U.S. 1003	29
People v. *Kurth*, 34 Ill. 2d 387, 216 N.E. 2d 154	30
Rathbun v. *United States*, 355 U.S. 107	19, 21
Sherman v. *United States*, 356 U.S. 369	22
United States v. *Edwards*, 366 F. 2d 853	29
United States v. *Jackson*, 390 F. 2d 317, certiorari denied, 392 U.S. 935	20
United States v. *Kaufer*, 406 F. 2d 550, affirmed, 394 U.S. 458	20, 29
United States v. *Leighton*, 386 F. 2d 822, certiorari denied, 390 U.S. 1025	20

Cases—Continued
United States v. *Martin*, 372 F. 2d 63, certiorari denied, 387 U.S. 919 — Page 30
United States v. *Pullings*, 321 F. 2d 287 — 29
United States v. *Teller*, C.A. 7, No. 16,047, decided June 13, 1969 — 28
United States v. *Walker*, 329 F. 2d 472, certiorari denied, 375 U.S. 934 — 29
Wallace v. *United States*, C.A.D.C., No. 21,134, decided May 6, 1969 — 28
Washington, State of, v. *Wright*, 444 P. 2d 676, certiorari denied, 394 U.S. 961 — 20
Constitution, statutes and rules:
United States Constitution:
Fourth amendment — 2, 8, 9, 10, 11, 12, 14, 15, 16, 17, 18, 19, 20, 21, 25, 27, 28
Fifth Amendment — 8
Communications Act Section 605 — 19
Omnibus Crime Control and Safe Streets Act of 1968 (82 Stat. 211) — 21
18 U.S.C. (Supp. IV) 2511 — 21
21 U.S.C. 174 — 2
26 U.S.C. 4705(a) — 2
Illinois Criminal Code of 1961, Article 14–2 — 29
Rule 26, F.R. Crim. P — 30
Miscellaneous:
ABA, *Standards Relating to Electronic Surveillance*, Tentative Draft, p. 124 — 21
S. Rep. No. 1097, 90th Cong., 2d Sess., p. 94 — 21

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. ~~1046~~ 46

UNITED STATES OF AMERICA, PETITIONER

v.

JAMES A. WHITE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals on rehearing *en banc* (A. 128–153) is reported at 405 F. 2d 838. The opinion of a panel of the court of appeals (A. 119–127) is not reported.

JURISDICTION

The judgment of the court of appeals on rehearing *en banc* was entered on January 7, 1969. The petition for a writ of certiorari was filed on February 6, 1969, and was granted on April 7, 1969 (394 U.S. 957). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, under the ruling in *Katz* v. *United States,* 389 U.S. 347, respondent's Fourth Amendment rights were violated where federal agents overheard conversations between respondent and an informant by means of an electronic device carried by the informant, with the informant's consent, but without obtaining a warrant.

2. Whether, even if otherwise applicable to overhearings accomplished with the consent of one of the parties to the conversation, *Katz* v. *United States* should be applied to such an overhearing which occurred prior to the date *Katz* was decided.

STATEMENT

One of two indictments returned in the United States District Court for the Northern District of Illinois charged that respondent transferred heroin without an order form on December 9, 1965, in violation of 26 U.S.C. 4705(a), and that on the same date he received heroin knowing that it had been illegally imported, in violation of 21 U.S.C. 174 (A. 17–18). A second indictment charged that on December 16, 1965, and December 29, 1965, respondent transferred heroin without an order form and that on those two dates and on January 8, 1966, he received heroin knowing that it had been illegally imported (A. 14–16). The two indictments were consolidated for trial, and a jury found respondent guilty on all counts. On November 30, 1966, he was

sentenced as a second offender[1] to twenty-five years' imprisonment on each of seven counts, the sentences to run concurrently. He was also fined $5,000 on each count, for a total fine of $35,000.

The issues in this case arise from the admission of testimony by federal agents concerning conversations they overheard incident to a series of narcotics transactions between respondent and an informant, Harvey Jackson, by means of a radio transmitter concealed on the informant. Before each meeting with respondent, the informant first met with the agents, who searched him for narcotics and outfitted him with the transmitter (see *e.g.* A. 20–21). On four occasions, the informant went to his own home with the agents to await the arrival of respondent; one agent concealed himself in a kitchen closet with the informant's consent and heard and saw the meetings between the informant and the respondent, while a second agent overheard their conversations over a radio receiver. Two other conversations occurred in the informant's automobile. A single conversation in the respondent's home and a conversation in a restaurant were also overheard by means of the radio equipment.

A. THE TRANSACTIONS OVERHEARD

1. *The initial transaction (December 9, 1965) and the overhearings of two conversations in the informant's home.* On Thursday, December 9, 1965, at about 8:00 p.m., narcotics agent Carl Jackson, who had hidden in a closet in the kitchen of informant Harvey

[1] In 1955, respondent had been sentenced in the Northern District of Illinois to a term of 4 years for selling narcotics.

Jackson's home, saw respondent give the informant a package containing heroin and heard respondent say that the package contained "[o]ne good ounce" and that he would return the following day for payment (A. 21–25, 40). A second agent, Robert DeFauw, who was situated in an automobile parked near the informant's home, made notes of the conversation which he heard on a radio that received the transmissions from the device on the informant's person (A. 41, 43–44, 84).

At about 10:45 a.m., the next morning, after the informant had telephoned respondent and told him to come to pick up the money (A. 25–27), respondent arrived at the informant's home and, in the kitchen, was given $1,000 by the informant. Respondent said he would have more "stuff" on Saturday night, December 11. Agent Carl Jackson saw and heard the meeting from the kitchen closet (A. 28–29), and agent DeFauw, stationed outside the home, heard the conversation over the radio (A. 45–48).

2. *The second transaction (December 16, 1965) and the overhearing of a conversation in respondent's home on December 14, 1965.* On Saturday, December 11, 1965, the informant Jackson went to a designated intersection to meet respondent, but the latter drove away shortly before Jackson could meet him (A. 30–31, 48–49). Later that day, in a telephone conversation which the informant allowed an agent to hear, respondent said that he had not waited because he did not like "to linger around when I got something on me." He also said that he would have more "stuff" on December 14 (A. 31–33).

On Tuesday, December 14, at 7:00 p.m., after the agents gave him $360, the informant went to respondent's residence. Agent DeFauw, who listened to their conversation over his radio in a nearby automobile, heard them count the money and heard respondent say that he would meet the informant on Thursday, December 16, in front of a clothing store and would sell him two ounces for $1250. Respondent also told Jackson to move the "stuff" faster and that the "Dagoes" wanted payment more promptly. A subsequent search of the informant confirmed that he no longer had the $360 (A. 50–53).

That Thursday, at about 6:00 p.m., Harvey Jackson kept his appointment with respondent at the clothing store, and the two men drove away in the informant's automobile. Agent DeFauw, who followed in another vehicle, heard their conversation about the price and quality of heroin over the radio receiver. After respondent said that he had to meet "my man right on time because he won't wait," the informant left his automobile. DeFauw saw respondent pick up co-indictee Sam Minerva and drive him a short distance in the informant's car (A. 53–55). After the informant reentered his own automobile, narcotics agent Kerstann who also had been following respondent heard, on the radio receiver, respondent tell the informant that he had met his contact and would leave the package on the seat of the car. When respondent left, Kerstann entered the informant's car and took possession of a package which contained heroin (A. 73–74).

354-282—69——2

3. *The third transaction (December 29, 1965) and the uncompleted fourth transaction.* On Tuesday, December 28, 1965, respondent again visited the informant's home. Narcotics agent Jackson, who was hidden in the closet, saw the informant give the respondent $1250 and heard the respondent tell him that he would have to get his money faster because the "Dago wants his money" (A. 34–36, 56). Over his radio receiver, agent DeFauw heard respondent tell the informant that he would have more heroin for him the next day (A. 57–58). The next day, the agents followed respondent and saw him meet with one Williams (A. 85–86). Later they observed co-indictee Sam Minerva enter respondent's car with a white shoe box and thereafter leave the vehicle carrying a leather brief case. Subsequently respondent entered a tavern where he spoke to the informant, and then each departed separately (A. 59–61). A short time later, respondent walked to the informant's car and handed him a sack (A. 81–83). Over a radio receiver, narcotics agent Meyer heard respondent ask the informant to drive Williams to the city's south side (A. 86–88). After discharging Williams, the informant gave agent DeFauw the paper sack which contained heroin (A. 89, 61).

On January 5, 1966, the respondent came to the informant's home. From the closet, agent Jackson observed the informant give respondent $1,300 and heard respondent tell the informant to bring an additional $950 to a restaurant (A. 36–39). Agent De-

Fauw also heard this conversation (A. 64–65). On January 7, 1966, the informant gave respondent the $950 at the restaurant. That meeting was observed by an agent in the restaurant, and agent DeFauw, in his automobile parked nearby, heard, over his radio receiver, respondent tell the informant that the price of heroin was going up to $2,500 for a package of "three things" and that he was to meet him at a particular intersection the next day where delivery would be made (A. 66–68, 89–90). The next day, January 8, the agents arrested respondent and Sam Minerva on the street shortly after they observed Minerva hand respondent a brown leather brief case which contained 1119.6 grams of heroin (A. 69–72, 83–84).

B. THE TRIAL

At the outset of trial, the government introduced evidence to show that it had attempted unsuccessfully to locate the informant, Harvey Jackson (A. 20, 39–40, 76–81). Respondent did not request a continuance on the ground that the informant was a material witness. Initially, after narcotics agent Carl Jackson stated that the informant had allowed him to listen, from the kitchen closet, to his conversation with respondent, respondent's counsel objected on the ground that he had "no way of telling what the conversation was" since Harvey Jackson could not be located (A. 23–24). Counsel then objected to testimony concerning a subsequent telephone conversation which the informant allowed the agent to hear, on the ground that the monitoring was a

"violation of the law both of Illinois and federal law, and the Federal Constitution" (A. 26). When testimony about the first conversation transmitted from the informant's home was introduced, respondent objected on the ground that it was overheard on a radio receiver "and the objection was made before, your Honor, that the radio communication was in violation of the statute" (A. 46). At the close of the government's case, respondent moved to strike the testimony concerning the conversations overheard on the radio receiver on the ground that they violated the Illinois Eavesdropping statute and the Fourth and Fifth Amendments to the Federal Constitution (A. 91).[2]

The informant's wife, whom respondent called as a witness, testified that she had seen her husband the previous evening (A. 103). Mrs. Jackson thereafter testified on cross-examination, however, that she did not know where to locate the informant (A. 116–117), and respondent did not move for a continuance.

C. THE DECISION OF THE COURT OF APPEALS

A panel of the court of appeals, one judge dissenting, reversed the conviction on the ground that, under *Katz* v. *United States*, 389 U.S. 347, the use of the transmitting device hidden on informer Jackson constituted an unreasonable search and seizure in the absence of a warrant (A. 119–127). On the government's petition for rehearing *en banc*, the full court, three

[2] In his motion for a new trial, respondent claimed that the court erred in admitting evidence of conversations obtained with the concealed radio transmitter and that he was denied a fair trial by the absence of Henry Jackson.

judges dissenting, also concluded that, both under *Katz* and under its understanding of the Fourth Amendment, respondent's rights were infringed when narcotics agents heard his conversations with the informant by means of the electronic device (A. 128–153). The court concluded that it was immaterial whether one party to a conversation consented to the use of the device, stating that the "crucial fact in each case is that the respective speakers did not consent to the overhearing of their statements and that the conversation was overheard by third persons uninvited by the speaker" (A. 136). The court distinguished *Lopez* v. *United States,* 373 U.S. 427, by interpreting it to apply only where the informant testifies at the trial about the conversation and the recording of such conversation is introduced for the limited purpose of corroboration (A. 142).

SUMMARY OF ARGUMENT

I

Respondent's Fourth Amendment rights were not violated by the concealment of a radio transmitting device on an undercover informant when he met with respondent to purchase narcotics from him. This Court has consistently held that the government may lawfully use the reports and testimony of undercover agents and informants concerning statements which criminal suspects have made to them, because the Fourth Amendment does not protect "a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it" (*Hoffa* v. *United States,* 385 U.S. 293, 302). As the Court held

in *Lopez* v. *United States,* 373 U.S. 427, it follows from the rule that the informant is entitled to disclose the contents of a conversation that Fourth Amendment rights similarly are unaffected where a government agent carries a concealed recording device during his meetings with a suspect.

The court below departed from those principles in holding in this case that the use of the transmitting device without obtaining a warrant was unlawful, under the test announced in *Katz* v. *United States,* 389 U.S. 347, because respondent "justifiably expected" his conversations with the informant to be private. Unlike *Katz,* however, the government overheard the conversations in the present case with the consent of one of the parties thereto. Whatever may have been respondent's misplaced confidence in the informant, he had no constitutionally protected right to prevent the informant from disclosing his statements, either by relating them from memory at some later time or by consenting to have the conversations disclosed at the time they took place. Moreover, there are important interests which justify the use of transmitting devices, including the creation of a verifiable record of the conversation—to protect the suspect from overreaching and to save the informant from intimidation and impeachment—and the maintenance of contact with the informant during a time when he may be subject to recriminations if his undercover role is suspected.

Contrary to the decision below, this Court's decision in *Lopez* is not distinguishable on the ground that the agent testified in that case while the informant here did not. In ruling upon respondent's Fourth Amendment objection, the admissibility of the evidence obtained by means of the radio transmitter depends upon the legality of the use of the transmitter, and not upon subsequent circumstances existing at trial. The government having established that it had unsuccessfully attempted to locate Harvey Jackson, the informant, there was no reason to preclude it from introducing other accurate evidence of respondent's narcotics transactions.

II

The ruling of the court of appeals was premised on that court's interpretation of the new standards announced in *Katz* v. *United States, supra.* In *Desist* v. *United States,* 394 U.S. 244, however, this Court held that the standards in *Katz* were to be applied only to electronic surveillances occurring after the announcement of that decision. The overhearings in this case, which antedated *Katz* by several years, were unquestionably legal under prior law; indeed, most of the conversations took place in the informant's home. Here, as in *Desist,* the agents justifiably relied on earlier decisions, and retroactive application of the *Katz* rule would have an adverse effect on the administration of justice. There is no reason in the circumstances of this case to depart from the ruling in *Desist.*

ARGUMENT

I

THE AGENTS' TESTIMONY AS TO STATEMENTS MADE BY RESPONDENT TO AN INFORMANT DURING NARCOTICS TRANSACTIONS—WHICH THE AGENTS OVERHEARD BY MEANS OF A TRANSMITTER CONCEALED ON THE INFORMANT WITH HIS CONSENT—WAS PROPERLY ADMITTED IN EVIDENCE SINCE THE OVERHEARING DID NOT VIOLATE RESPONDENT'S FOURTH AMENDMENT RIGHTS

The principal issue in this case involves the effect of the Court's decision in *Katz* v. *United States,* 389 U.S. 347, on earlier decisions sustaining, against Fourth Amendment challenges, the admission of evidence secured through the use of undercover agents and informants, including evidence of conversations overheard or recorded by means of electronic devices concealed on informants. *E.g., Lopez* v. *United States,* 373 U.S. 427; *Hoffa* v. *United States,* 385 U.S. 293; *Lewis* v. *United States,* 385 U.S. 206.

The overhearings in the present case were accomplished by means of a transmitting device which a government informant consented to wear during his meetings with respondent. The informant carried the transmitter only at meetings which were held for the specific purpose of making arrangements for or completing a purchase of narcotics from respondent.[3] With only two exceptions the meetings took place in

[3] Although respondent, testifying in his own defense, denied that some of the meetings occurred (*e.g.* Tr. 571), he testified that he and the informant were engaged in gambling in 1965 and that this was the subject matter of their conversations whenever they did meet (Tr. 542–544).

the informant's home or automobile.[4] And the meetings which occurred in the informant's home were also observed and heard by another agent who was concealed in a closet.

Despite the clear distinction between the facts here and those in *Katz*—where agents employed a listening device to record the petitioner's voice without consent of either party to the conversation—the court below held, on the authority of *Katz*, that the informant's instantaneous disclosure, by means of an electronic device, of a conversation which he could later orally report is subject to the same constitutional restrictions as the government's electronic interception of a conversation which neither party thereto expects or desires to disclose. That decision, we submit, is neither required nor justified by the policies announced in *Katz*.

A. THE DECISION IN *Katz* v. *United States* DOES NOT IMPOSE FOURTH AMENDMENT RESTRICTIONS ON THE GOVERNMENT'S USE OF ELECTRONIC DEVICES TO MONITOR CONVERSATIONS WITH THE CONSENT OF ONE OF THE PARTIES THERETO

1. Our argument rests on the principle that the Fourth Amendment does not restrict the government's receipt and use of an informant's report concerning

[4] The two exceptions were a meeting, part of the second transaction, which took place in respondent's home, and another meeting, part of the fourth transaction, held in a restaurant. Another meeting, part of the third transaction, occurred at the restaurant, but there was no testimony concerning the conversation which occurred at this meeting. The fourth transaction alone did not result in a transfer of heroin to the informant; it was terminated prior to consummation when the respondent was arrested with heroin on his person before he was able to make any delivery to the informant.

statements which a suspect makes to him or in his presence. As the Court said in *Hoffa* v. *United States*, 385 U.S. 293, 302, "[n]either this Court nor any member of it has ever expressed the view that the Fourth Amendment protects a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it." In *Hoffa*, a local union official who had agreed to serve as an informant for the government secured frequent access to the petitioner's hotel suite and was privy to the petitioner's conversations, which he reported to federal agents and subsequently related at trial. The Court rejected the contentions that the informant had improperly insinuated himself into the hotel suite and that his reports and testimony were the product of an illegal "search" for verbal evidence; it held that "no interest legitimately protected by the Fourth Amendment is involved" (*ibid.*). Similarly, in *Lewis* v. *United States*, 385 U.S. 206, decided the same day as *Hoffa*, the Court rejected a Fourth Amendment challenge to the testimony of an undercover agent whom the petitioner had invited to his home for the purpose of executing an unlawful sale of narcotics. The Court held that the agent was lawfully on the premises and that he did not "see, hear, or take anything that was not contemplated, and in fact intended, by petitioner * * *" (385 U.S. at 210).

The Court in *Hoffa* expressly relied on the "unanimous" decision in *Lopez* v. *United States*, 373 U.S. 427, sustaining the admissibility of a revenue agent's testimony with respect to bribery offers by Lopez

during a conversation in the latter's office (see 385 U.S. at 302–303). In *Lopez* the Court, after noting that the agent was lawfully in Lopez' office with his consent, said: "The only evidence obtained consisted of statements made by Lopez to Davis [the agent], statements which Lopez knew full well could be used against him by Davis if he wished" (373 U.S. at 438). Thus, the Court held that the petitioner's statements were not "constitutionally protected communication[s]," that there was no Fourth Amendment violation in the circumstances whereby the agent participated in the conversation, and that the agent's testimony concerning these conversations was properly received (*ibid.*).

The Court's holding on that issue was the premise for the more significant ruling by the majority in *Lopez* that the concealment of an electronic recording device on the agent likewise did not violate Lopez' Fourth Amendment rights. The Court's reasoning is equally applicable to the present case (373 U.S. at 439):

> * * * [T]his case involves no "eavesdropping" whatever in any proper sense of that term. The Government did not use an electronic device to listen in on conversations it could not otherwise have heard. Instead, the device was used only to obtain the most reliable evidence possible of a conversation in which the Government's own agent was a participant and which that agent was fully entitled to disclose. * * *

Under the rationale of *Lopez*, therefore, the electronic transmission of respondent's conversations with

the informant in this case involved no violation of respondent's Fourth Amendment rights. Here, as in *Lopez,* the transmitting device "neither saw nor heard more than the agent himself" (373 U.S. at 439). Although the defendant in *Lopez* knew that he was dealing with a government employee, while respondent here was unaware of the informant's role, the same principle governs both cases. Once it is recognized that the government may use an undercover agent or informant who may disclose the contents of a conversation he has overheard—as *Hoffa* and *Lewis* have held that it may—*Lopez* establishes that the communication is not constitutionally protected from simultaneous disclosure through the use of an electronic device that the agent or informant carries.

2. This court's decision in *Katz* v. *United States, supra,* does not undermine the rationale of *Lopez.*

There is no indication in *Katz* that the Court intended to disturb the premise of *Lopez* that the government's use of informants who themselves may reveal the contents of conversations does not violate the Fourth Amendment. Indeed, the Court in *Katz* cited *Lewis* for the proposition that "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection" (389 U.S. at 351). The "public" in *Lewis,* of course, was the undercover agent whom the petitioner had invited to his home for the purpose of completing a sale of narcotics.

Moreover, the test which the Court adopted in *Katz*—focusing on the individual's reasonable ex-

pectation of privacy—is fully consistent with the Court's resolution in *Hoffa* that the petitioner's "misplaced confidence" that an informant would not reveal his wrongdoing was not an "interest legitimately protected by the Fourth Amendment" (385 U.S. at 302). There is nothing in the rationale of *Katz* which undermines the Court's recognition in *Lewis* of the undesirability of imposing Fourth Amendment restrictions on the government's use of undercover agents and informants (see 385 U.S. at 210).

This much the court below did not dispute. The court held, however, that *Katz* requires a distinction between the use of informants who themselves may disclose the contents of conversations and the use of informants who carry concealed devices to record conversations or to transmit them simultaneously to the police. The court concluded that *Hoffa* and *Lewis* were unimpaired by *Katz* because the defendants in those cases "took the risk" that they might be dealing with informants and thus "waived" any Fourth Amendment rights with respect to the conversations (A. 141–142). But the court held that the concealment of the transmitting device on the informant in the present case was unlawful because respondent "justifiably expected his conversations to be private" (A. 140).

Phrases like "taking the risk" and "justifiable expectation of privacy," however, merely reflect the judicial conclusion that under the circumstances of the particular case the protection of the Fourth Amendment should or should not be extended to the particu-

lar conversations. Those "risks" and "expectations" are present in almost every criminal activity. It is not unrealistic to say that respondent in the present case, like the defendants in *Lewis* and *Lopez*, "took the risk" that he was dealing with an undercover informant and that the informant might be carrying a transmitting device. It is equally true that they "expected their conversations to be private" and relied on that expectation in engaging in unlawful conduct. But whether respondent's expectation was "justified", under the test announced in *Katz*, does not turn upon the extent of his confidence in Harvey Jackson or the measures he might have taken to avoid police surveillance. The critical inquiry, rather, is whether the policies of the Fourth Amendment protect respondent's expectation that Jackson would not be carrying a concealed transmitter supplied by federal agents. We submit that they do not.

Once it is recognized that respondent could not have maintained a Fourth Amendment challenge to the testimony of the informant in the present case, the issues raised by the use of the transmitting device emerge in proper focus. The respondent having freely engaged in the narcotic sales to the informant, the only interests of which he was deprived by the transmitting device were those which directly violate the integrity of the criminal process—the possibility that the informant's memory might fail or that he might be subject to impeachment on collateral matters and the opportunity to avoid the informant's testimony altogether by bribery, intimidation, or physical violence.

In *Lopez,* the Court specifically rejected the suggestion that those interests were constitutionally protected (373 U.S. at 439):

> Stripped to its essentials, petitioner's argument amounts to saying that he has a constitutional right to rely on possible flaws in the agent's memory, or to challenge the agent's credibility without being beset by corroborating evidence that is not susceptible of impeachment. For no other argument can justify excluding an accurate version of a conversation that the agent could testify to from memory. We think the risk that petitioner took in the offering a bribe to Davis fairly included the risk that the offer would be accurately reproduced in court, whether by faultless memory or mechanical recording.

The principle that there is no Fourth Amendment violation where a conversation which may be disclosed at trial is accurately recorded, either mechanically or by allowing another to hear it simultaneously, was premised in *Lopez* on *Rathbun* v. *United States,* 355 U.S. 107. There, the police listened to the defendant's conversation, without his knowledge, on an extension telephone with the consent of the other party. Although the case arose in the context of a claimed violation of Section 605 of the Communications Act, the Court's rationale would apply as well to a claim of a violation of the Fourth Amendment (355 U.S. at 111):

> * * * Each party to a telephone conversations takes the risk that the other party may have an extension telephone and may allow another to overhear the conversation. When such takes

> place there has been no violation of any privacy of which the parties may complain. * * *

The decision in *Katz* did not change the fact that each party to a conversation can have only limited control over the use which the other party makes of his statements. Just as one joint user of tangible property assumes the risk that the other user will expose it, and each has authority to consent to a search of the property (see *Frazier* v. *Cupp*, No. 643, 1968 Term, decided April 22, 1969), a participant in a conversation is necessarily subject to the risk that the other party may make it public. The timing of such disclosure—whether the other party elects to disclose the contents of the conversation at the time it occurs or thereafter—does not determine whether there has been a Fourth Amendment violation.[5] As Justice White stated in his concurring opinion in *Katz* (389 U.S. 347, 363, n. *):

---

[5] Except for the court below, all the courts of appeals which have had occasion to rule on the issue since the *Katz* decision have so held. *United States* v. *Kaufer*, 406 F. 2d 550 (C.A. 2), affirmed, 394 U.S. 458; *United States* v. *Leighton*, 386 F. 2d 822 (C.A. 2), certiorari denied, 390 U.S. 1025; *United States* v. *Jackson*, 390 F. 2d 317 (C.A. 2), certiorari denied, 392 U.S. 935; *Koran* v. *United States*, 408 F. 2d 1321 (C.A. 5); *Dancy* v. *United States*, 390 F. 2d 370 (C.A. 5); *Handsford* v. *United States*, 390 F. 2d 373 (C.A. 5), certiorari denied, 391 U.S. 915; *Long* v. *United States*, 387 F. 2d 377 (C.A. 5), certiorari denied, 390 U.S. 952; *Fountain* v. *United States*, 384 F. 2d 624 (C.A. 5), certiorari denied *sub nom. Marshall* v. *United States*, 390 U.S. 1005; *Holt* v. *United States*, 404 F. 2d 914, 919–920 (C.A. 10). (Although a different panel of the Court of Appeals for the Tenth Circuit had ruled in accordance with the opinion below in *Doty* v. *United States*, Nos. 9031–9038, decided June 4, 1968, a petition for rehearing has been granted in that case.) See also *State of Washington* v. *Wright*, 444 P. 2d 676, certiorari denied, 394 U.S. 961; *Marshall* v. *United States*, 409 F. 2d 925 (C.A. 9).

> * * * When one man speaks to another he takes all the * * * risk that the man to whom he speaks will make public what he has heard. The Fourth Amendment does not protect against unreliable (or law-abiding) associates. *Hoffa* v. *United States, supra.* It is but a logical and reasonable extension of this principle that a man take the risk that his hearer, free to memorize what he hears for later verbatim repetitions, is instead recording it or transmitting it to another. * * *

Congress has also recently expressed its judgment that the monitoring of conversations by listening devices carried by one party thereto does not invade any constitutionally protected right. In Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (82 Stat. 211)—which was enacted after the narcotics transactions in this case and which prohibits the interception of communications without prior judicial authorization—Congress specifically provided that it shall not be unlawful to intercept a communication where a party to the communication has given prior consent to the interception (18 U.S.C. (Supp. IV) 2511).[6] Implicit in the Congressional judgment in the Omnibus Crime Act is a recognition that where one of the parties to a conversation consents to its overhearing, there is no invasion of privacy interests protected by the Fourth Amendment. Unlike non-consensual eavesdropping,

[6] A study committee of the American Bar Association has taken a similar view. See ABA, *Standards Relating to Electronic Surveillance*, Tentative Draft, p. 124. The Senate Report recognized that the distinction between consensual and non-consensual overhearing largely reflected existing law. S. Rep. No. 1097, 90th Cong., 2d Sess., p. 94. See *Lopez* v. *United States*, 373 U.S. 427; *Rathbun* v. *United States*, 355 U.S. 107.

which can be initiated solely at the discretion of the police and which can be used to overhear all conversations in the vicinity of the device, consensual monitoring is usually limited to a discrete transaction and can reach only those conversations to which the informant is privy. There is also little likelihood that an individual will discuss confidential personal matters with an informant who is simply attempting to make an illicit purchase of narcotics.

Moreover, unlike non-consensual eavesdropping, the use of electronic surveillance with the consent of one party to a conversation serves important interests other than the gathering of evidence of criminal activity. It operates as a safeguard on the government's use of informants and as a protection for the innocent, while depriving the guilty only of the opportunity of challenging the informant's credibility free of corroboration. In the absence of electronic devices, the possibility exists that an informant may, without malice, interpret conversations in a way which is unfair to the suspect. Where entrapment is in issue, even slight nuances in describing a conversation may be of crucial importance in drawing the line "between the trap for the unwary innocent and the trap for the unwary criminal." *Sherman* v. *United States,* 356 U.S. 369, 372.

In addition, an electronic device may be important for the protection of the informant both during the transaction and thereafter. It is common knowledge that an informant, particularly one who participates in narcotics transactions, places his life in jeopardy

when he assists law enforcement officers. During the transaction, a transmitting device on the informant's person provides a lifeline to nearby agents in the event his undercover role is discovered or suspected. And when the transaction occurs in a moving vehicle, the transmitting device makes it possible for the agents not only to hear the conversation, but to keep the vehicle under surveillance. Subsequently, when the suspect is charged with the crime, the fact that the case against him does not rest simply on evidence from the informant but also on evidence obtained through electronic devices removes any motivation to threaten or harm the informant in order to escape conviction.

For these reasons, the right of law enforcement officers to use a listening device on an informant or undercover agent should not be limited to those situations where they have "probable cause" to believe that an individual has committed a crime.[7] For example, an agent may have some information indicating that a particular individual is in the business of selling narcotics at a particular location. Even though such information might not amount to probable cause, effective law

[7] The equivalent of a warrant procedure was used in *Osborn* v. *United States*, 385 U.S. 323. There were, however, special circumstances in that case since the suspect was the attorney for an indicted defendant in a case about to be called for trial, and the informant had alleged that the attorney was planning to offer a bribe to a prospective juror. In a case which so closely involved the processes of the court, both with respect to the suspected offenses and the suspected offender, there was particular reason to seek prior judicial authorization in order not to interfere with the pending prosecution.

enforcement requires that the agent should be able to conduct a further investigation to determine whether his information was correct. The best technique for such further inquiry might be to send an undercover agent or an informant to the location with instructions to approach the suspect and attempt to purchase narcotics from him. In such a situation, it would be entirely appropriate to place a listening device on the informant or agent in order to obtain an accurate report of the conversation that occurs and to protect the informant or agent involved. The presence or absence of "probable cause" does not affect the appropriateness of the use of a consensual listening device in such an investigation.

This Court decided in *Lewis* that the government did not need the approval of a magistrate to send an informant into the home of a defendant who used his home for the narcotics trade. There is similarly no reason to require a warrant for the use of a device which merely records or transmits what the informant does, either in the defendant's home, or, with respect to most of the conversations in this case, in the informant's home or automobile.

B. THE UNAVAILABILITY OF THE INFORMANT AS A WITNESS DOES NOT RENDER INADMISSIBLE TESTIMONY CONCERNING THE CONVERSATIONS HEARD OVER THE TRANSMITTER.

The court below distinguished *Lopez* on the ground that the government agent in *Lopez* testified as a witness, while Harvey Jackson, the informant, did not testify here. We do not read *Lopez,* however, as holding only that a recording of a conversation is admissible for

the limited purpose of corroborating such testimony.

As we read *Lopez,* the excludibility, on Fourth Amendment grounds, of the agent's testimony in this case depends on the legality of the agents' conduct at the time when the evidence was secured and not upon the availability of the informant as a witness at trial. Whether or not the evidence is subsequently used at the trial for the limited purpose of corroboration cannot affect the legality of its procurement.[8] If the Fourth Amendment permits a participant in a conversation to carry an electronic device to transmit or record a conversation, the absence of the participant as a witness at the time of trial does not create a *nunc pro tunc* violation of the Fourth Amendment. So long as the government does not supress evidence (see *Brady* v. *Maryland,* 373 U.S. 83), the evidence obtained through participant monitoring should be admissible whether the participant testifies or not.

The government here did not suppress the testimony of the informant, Harvey Jackson, but actively sought to locate him prior to trial.[9] See Statement, *supra,* p. 7. Having failed to locate the informant, there is no sound reason why the government should be pre-

[8] It may be argued here, with respect to the electronic overhearings of conversations in the informant's home, that they corroborated what the agent in the closet saw and heard.

[9] The concurring opinion of Chief Justice Warren in *Lopez* v. *United States*, 373 U.S. 427, 441–446, suggested, in distinguishing *On Lee* v. *United States*, 343 U.S. 747, that the government had improperly used a transmitting device to avoid calling the informant as a witness in that case. However, nothing in this case even suggests that the government was trying to suppress evidence. Here, as we have shown, the informant was not produced because he could not be found.

vented from using other reliable evidence to prove that respondent was a narcotic trafficker. The unavailability of a material witness without fault of the government, in the absence of some actual prejudice to the accused, has never been considered to be a reason for suppressing other legally obtained evidence. Indeed the possibility that the informant may disappear before trial, by foul play or otherwise, is one of the justifications for the use of electronic devices.

The absence of a material witness may justify a continuance of the trial if there is a reasonable likelihood that a delay will secure the presence of the witness. Here, respondent not only failed to seek a continuance, but he did not claim that the informant's testimony was a necessary predicate to the admissibility of the government's other evidence or that the informant was needed by the defense to help establish some ground for excluding the electronically obtained evidence. Indeed, even after Harvey Jackson's wife testified as a defense witness that she had seen her husband the previous night (although admitting, on cross-examination, that she did not know where he could be located), respondent did not request a continuance so that additional efforts could be made to find Jackson.

II

EVEN IF IT IS NECESSARY, UNDER *KATZ* V. *UNITED STATES*, 389 U.S. 347, TO OBTAIN PRIOR JUDICIAL APPROVAL FOR AN INFORMANT TO CARRY A TRANSMITTING DEVICE, THE *KATZ* DECISION SHOULD NOT BE APPLIED RETROACTIVELY TO THIS CASE.

If the Court should reject our submission that the ruling in *Katz* does not require prior judicial ap-

proval for an informant to carry a transmitting device while engaged in narcotic transactions, we would urge that the judgment of the court of appeals should nevertheless be reversed and the convictions reinstated because the *Katz* decision should not be applied retroactively to this case. We think it follows from *Desist* v. *United States,* 394 U.S. 244, that the standards announced in *Katz* do not govern the legality of the participant monitoring which occurred here.

The Court in *Katz* overruled prior decisions that mechanically assisted eavesdropping does not violate the Fourth Amendment unless there is a trespass or an actual penetration of a particular enclosure; it held that the reach of the Amendment "cannot turn upon the presence or absence of a physical intrusion into any given enclosure" (389 U.S. at 353). In *Desist,* government agents situated in a hotel room tapped the petitioner's conversations by means of an electronic recording device which did not physically intrude into the petitioner's adjoining room. This Court concluded that such eavesdropping was permissible under pre-*Katz* decisions and affirmed the conviction secured through the introduction of that evidence. The Court held that *Katz* is to be applied only to cases in which the prosecution seeks to introduce the fruits of electronic surveillance conducted after the date of the *Katz* decision, December 18, 1967. In rejecting the argument that *Katz* did not depart from the previously existing interpretation of the Constitution, the Court stated in *Desist* (394 U.S. at 247–248): [10]

[10] See also *Kaiser* v. *New York*, 394 U.S. 280.

> * * * But this contention misconstrues our opinion in *Katz*. Our holding there that *Goldman* and *Olmstead* "can no longer be regarded as controlling," 389 U.S., at 353, recognized that those decisions had not been overruled until that day. True, the principles they expressed had been modified. The belief that an oral conversation could not be the object of a "search" or "seizure" had not survived. And in *Silverman* v. *United States*, 365 U.S. 505, we had cautioned that the scope of the Fourth Amendment could not be ascertained by resort to the "ancient niceties of tort or real property law." 365 U.S., at 511. But the assumption persisted that electronic surveillance did not offend the Constitution unless there was an "actual intrusion into a constitutionally protected area." * * *

Under the rule that electronic surveillance without a trespass did not violate the Fourth Amendment, the conduct of the narcotics agents in December 1965 and January 1966 in the instant case was legal. In *On Lee* v. *United States*, 343 U.S. 747, this Court expressly held that there was no trespass when an informant entered On Lee's premises with a microphone hidden on his person. Such monitoring was sustained against a Fourth Amendment challenge by this Court in *Lopez* v. *United States*, 373 U.S. 427. It had been upheld by all the courts of appeals—including the Seventh Circuit—which ruled on the issue in the period before *Katz*.[11] See, *e.g.*, *Harris* v. *United States*,

[11] Indeed, the Seventh Circuit itself has followed *Desist* in a decision subsequent to its decision here. *United States* v. *Teller*, No. 16,047 (C.A. 7), decided June 13, 1969. In *Teller*, the transactions occurred in July 1966 while the transactions here occurred in December 1965 and January 1966. See also *Wallace* v. *United States*, No. 21, 134 (C.A.D.C.), decided May 6, 1969.

367 F. 2d 633 (C.A. 1), certiorari denied, 386 U.S. 915; *United States* v. *Edwards*, 366 F. 2d 853, 868 (C.A. 2); *Johns* v. *United States*, 323 F. 2d 421 (C.A. 5); *United States* v. *Walker*, 320 F. 2d 472 (C.A. 6), certiorari denied, 375 U.S. 934; *United States* v. *Pullings*, 321 F. 2d 287, 295 (C.A. 7); *Jack* v. *United States*, 387 F. 2d 471 (C.A. 9), certiorari denied, 392 U.S. 934.

This Court has already recognized that the principles enunciated in *Desist* apply to cases involving eavesdropping accomplished with the consent of one of the parties. In *Kaufer* v. *United States*, 394 U.S. 458, the Court relied on *Desist* in affirming a conviction which was based, in part, on testimony of federal agents concerning conversations which they overheard by means of an electronic device secreted on the person of an agent who was conversing with the defendant. If the rule of *Katz* does not apply retroactively to a case such as *Kaufer*, there is no reason to apply *Katz* retroactively to the overhearings in this case.[12]

[12] In his brief in opposition to the petition for certiorari, respondent argued that this Court should not retroactively validate a violation of Illinois law. Contrary to this contention, neither the action of the agents nor that of the informant was in violation of the Illinois eavesdropping statute (Article 14–2 of the Illinois Criminal Code of 1961) which proscribes the use of an eavesdropping device to hear a conversation "without the consent of any party thereto." In 1961, the Illinois Supreme Court held that an electronically-assisted overhearing does not violate this statute if consent is obtained from one of the parties to a conversation. *People* v. *Dixon*, 22 Ill. 2d 513, 177 N.E. 2d 224, certiorari denied, 368 U.S. 1003. Thus, when the device was used in this case in December 1965 and January 1966, the overhearings were both legal and admissible into evidence under Illinois law. The fact that

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court of appeals should be reversed and the convictions reinstated.

ERWIN N. GRISWOLD,
Solicitor General.
WILL WILSON,
Assistant Attorney General.
JOSEPH. J. CONNOLLY,
JOHN S. MARTIN, JR.,
Assistants to the Solicitor General.
BEATRICE ROSENBERG,
SIDNEY M. GLAZER,
Attorneys.

JUNE 1969.

---

subsequently in March 1966, the Illinois Supreme Court in *People* v. *Kurth*, 34 Ill. 2d 387, 216 N.E. 2d 154, overruled so much of the *Dixon* opinion as permitted the introduction into evidence of a monitored conversation against the party whose consent had not been obtained did not make this evidence inadmissible in a federal proceeding. Rule 26, F.R. Crim. P. See also *Elkins* v. *United States*, 364 U.S. 206, 223–224. Indeed, the *Kurth* opinion itself expressly rejected an argument that monitoring with the consent of only one party violated Illinois law. See *United States* v. *Martin*, 372 F. 2d 63 (C.A. 7), certiorari denied, 387 U.S. 919.

U.S. GOVERNMENT PRINTING OFFICE: 1969

Office Supreme Court, U.S.
FILED
SEP 11 1969
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM—1969

No. ~~40~~ 13

UNITED STATES OF AMERICA,
Petitioner,

vs.

JAMES A. WHITE,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR *AMICI CURIAE* JOHN G. BRODY, SAMUEL DESIST, JACK A. PEARL, JOSEPH ALFRED TANNER AND RALPH TROPIANO, IN SUPPORT OF RESPONDENT JAMES A. WHITE

ABRAHAM GLASSER,
Attorney for Amici Curiae Brody, Desist, Pearl, Tanner and Tropiano,
52 Eighth Avenue,
New York, N. Y. 10014

MAURICE EDELBAUM,
Attorney for Amici Curiae Brody and Tanner,
250 Broadway,
New York, N. Y.

Adams Press Corp., 180 Cedar Street, N. Y.—Beekman 8-1050-51

TABLE OF CONTENTS

PAGE

THE PARTIES CONSENT TO THE FILING OF THIS AMICUS BRIEF 2

THE INTERESTS OF THE AMICI 2

ARGUMENT—Summary of Argument 5

Introductory to Argument 5

Point I—Individual human privacy has or should have the supreme value in humanistic, democratic society of the modern western type. This "value judgment" should be made controlling, as a matter of constitutional policy, in all cases of governmental electronic intrusion against private individuals. Except perhaps for situations of supreme public necessity involving the physical safety of the nation or of a particular populated community or vital public installation, and even then only for purposes of preventive security action by responsible governmental agencies at the highest level rather than for obtaining of prosecutorial evidence, no electronic eavesdropping — including methods involving no "tangible" physical intrusion in the conventional senses, and including so-called one-party-consent intrusions—can be constitutional under the Fourth, Fifth and Ninth Amendments 9

The "Philosophy" Of Electronic Eavesdropping And The Constitutional Values Which It Challenges Even When It Is Done With So-Called One-Party Consent 10

PAGE

Point II—

A. If Katz v. United States, 389 U. S. 347, is read as making the Fourth Amendment applicable to one-party-consent electronic monitoring of the type here involved, and if such applicability of Katz should be deemed nevertheless precluded in this case because of the "prospectivity" ruling of Desist v. United States, 394 U. S. 244, then the Desist ruling should be re-examined to determine whether the Court has dealt soundly with the whole problem of retroactivity-prospectivity in the serious of cases commencing with Linkletter v. Walker, 381 U. S. 618.

B. In any event, aside from problems of "retroactivity versus prospectivity" as such, Desist should be reconsidered in relation to Katz because Desist is unsound in failing to recognize that Katz applied pre-existing law of the Fourth Amendment.

C. In any event furthermore, the judgment in this White case should be affirmed on its particular facts—alleged one-party-consent monitoring by a Kel device—on the authority of Osborn v. United States, 385 U. S. 323; and Osborn should be held to have applied the pre-existing law of the Fourth Amendment or, via a reconsideration of Desist, Osborn should be given "retroactive" effect..... 29

CONCLUSION 43

PAGE

Cases Cited

Berger v. New York, 388 U. S. 41 ..... 6, 7, 9, 18, 39

Bloom v. Illinois, 391 U. S. 194 32

Burton v. United States, 391 U. S. 123 32

Butenko v. United States, No. 197, reported, 4 Criminal Law Reporter 4053 (October 23, 1968, Vol. 4, No. 4, Section 4) 36

Clinton v. Virginia, 377 U. S. 168 6

Desist v. United States, 394 U. S. 244, rehearing denied, —— U. S. ——, 23 L. Ed. 2d 251 ..... 2-4, 29, 30, 30fn, 31, 31fn, 32, 33, 35

DeStefano v. Woods, 392 U. S. 631 32

District of Columbia v. Little, 178 F. 2d 13 (C. A. D. C. 1950), aff'd 339 U. S. 1 10

Duncan v. Louisiana, 391 U. S. 145 32

Escobedo v. Illinois, 378 U. S. 478 31

Fuller v. Alaska, 393 U. S. 80 ..... 30fn

Gilbert v. California, 388 U. S. 263 32

Goldman v. United States, 316 U. S. 129 ..... 36, 37, 41

Griffin v. California, 380 U. S. 263 31

Jenkins v. Delaware, —— U. S. ——, 23 L. Ed. 253 ..... 3, 32

Johnson v. New Jersey, 384 U. S. 719 31

Katz v. United States, 389 U. S. 347 ..... 2, 4, 5, 7, 8, 29-31, 36-43

Kaiser v. New York, 394 U. S. 280 ..... 31fn

PAGE

Kaufer v. United States, 394 U. S. 458 ..... 31fn

Ker v. California, 374 U. S. 23 39

Lee v. Florida, 392 U. S. 378 ..... 30fn

Linkletter v. Walker, 381 U. S. 618 29-35

Lopez v. United States, 373 U. S. 427 39

Mapp v. Ohio, 367 U. S. 643 30

Marbury v. Madison, 1 Cranch. 137 21

McConnell v. Rhay, 393 U. S. 2 32

Miranda v. Arizona, 384 U. S. 436 ..... 31, 32

Mempa v. Rhay, 389 U. S. 128 32

Nordelli v. United States, 24 F. 2d 665 39

Olmstead v. United States, 277 U. S. 438 ..... 36, 37, 41

Osborn v. United States, 385 U. S. 323 ..... 5, 7, 7fn, 8fn, 29, 35, 39, 42, 43

Roberts v. Russell, 392 U. S. 293 32

Silverman v. United States, 365 U. S. 505 ..... 6, 37, 41, 42

Stovall v. Denno, 388 U. S. 293 32

Tehan v. Shott, 382 U. S. 406 31

United States v. Missler (C. A. 4, decided August 25, 1969—Sobeloff, J.), 5 Criminal Law Reporter 2405, September 3, 1969 ..... 6fn

United States v. Wade, 388 U .S. 218 32

U. S. v. White, No. 46, p. 20, n. 5 ..... 5-8fn, 19, 27, 29fn 31fn

Warden v. Hayden, 387 U. S. 294 37

Wong Sun v. United States, 371 U. S. 471 42

PAGE

United States Constitution Cited

Fourth Amendment.....5, 5fn, 6, 7, 9, 26-30fn, 31, 35-37, 40-42

Fifth Amendment.....5, 5fn, 6, 8, 9

Ninth Amendment.....5, 8, 9

Statutes Cited

Alien and Sedition Laws..... 16

Hobbs Act 4

47 U.S.C. (Federal Communications Act):

Sec. 605 ..... 30fn

Rule Cited

Rule 42(2) 2

Texts Cited

Encyclopedia Britannica, Eleventh ed., article entitled "Jacobins", p. 117, fn. 1..... 32fn

Miguel de Cervantes, Don Quixote (Ozell's Revision of the Translation of Peter Motteux (1930):

pp. xx-xxi 21fn

IN THE

Supreme Court of the United States

OCTOBER TERM 1969

No. 46

UNITED STATES OF AMERICA,
Petitioner,

v.

JAMES A. WHITE,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR *AMICI CURIAE* JOHN G. BROADY, SAMUEL DESIST, JACK A. PEARL, JOSEPH ALFRED TANNER AND RALPH TROPIANO, IN SUPPORT OF RESPONDENT JAMES A. WHITE

This brief amicus curiae, in support of the position of the respondent James A. White, is respectfully submitted by amici curiae John G. Broady, Samuel Desist, Jack A. Pearl, Joseph Alfred Tanner and Ralph Tropiano.

The Parties' Consent to the Filing of This Amicus Brief

This amicus brief is accompanied by written consent of the Solicitor General and of counsel for the respondent James A. White, pursuant to Rule 42(2).

The Interests of the Amici

Amicus John G. Broady is a defendant under several indictments now pending in the Supreme Court of the State of New York, New York County,* in which decision of the issues of the instant case by this Court will or may have a dispositive effect. (Broady is represented in those New York State proceedings by Maurice Edelbaum, Esq. (co-counsel for Broady in the within amicus presentation.) Broady's indictments include charges of violation of New York's anti-eavesdropping statutes. Broady, a private investigator, is charged in some of those indictments with having obtained investigative information by illegal use of electronic devices. The State charges against Broady were developed with the aid of informers who were equipped with "minifon"-type electronic recording devices in alleged conversations with Broady and with other persons. Broady's situation is thus closely comparable to that of the within respondent James A. White, as regards the question of whether use of the minifon (or Kel) type of electronic monitoring device taints prosecutive evidence thus obtained. The instant White case, and the case of amicus Broady, likewise commonly involve the question of whether, even if *Katz* v. *United States*, 389 U. S. 347, in the light of the "prospectivity" ruling of *Desist* v. *United States*, 394

* The indictment numbers are 4821-1/2-1966, 4822-1966, 4842-1966, 4843-1/2-1966 and 4844-1/2-1966.

U. S. 244, is not applicable to Messrs. White or Broady, nevertheless the electronic activity involved was unconstitutional by pre-*Katz* standards. The monitoring of White took place in December 1965-January 1966. The monitoring of Broady is believed to have taken place at least in part during the second half of 1966. Broady has duly preserved, in the State proceedings, the federal constitutional issues here involved. He has not yet been brought to trial on any of the aforesaid indictments.

Amicus Samuel Desist was one of the unsuccessful petitioners in *Desist* v. *United States*, 394 U. S. 244, rehearing denied —— U. S. ——, 23 L. Ed. 2d 251, where *Katz*, *supra*, was held applicable only to police electronic activity occurring after the date of decision of *Katz* (December 18, 1967). Had *Katz* been held applicable to the *Desist* case facts, the federal narcotics convictions in the latter case would have fallen (the Government so conceded in the *Desist* argument). If the instant *White* case should produce a ruling that the non-trespassory electronic monitoring of Mr. White was illegal but for the problem of "retroactivity" of *Katz*, the forthcoming decision in *White* will necessarily deal also with either the *Katz*-retroactivity problem or with the problem of illegality of non-trespassory electronic activity under pre-*Katz* standards. Amicus Desist has a vital interest in the latter branches of the *White* case issue structure. And it seems realistic to expect the possibility of a *de novo* examination of the retroactivity problem by this Court in view of Mr. Justice Harlan's statement in his dissenting opinion in *Desist*, *supra*, that "Retroactivity must be rethought"; cf. Mr. Justice Harlan's statement in his dissenting opinion in *Jenkins* v. *Delaware*, —— U. S. , 23 L. Ed. 253, 262, that "* * * the time has come for us to take a fresh look at the whole problem of retroactivity". (Undersigned amicus counsel Abraham Glasser

argued the *Desist* case in this Court for all of the petitioners.)

Amici Jack A. Pearl and Joseph Alfred Tanner were convicted on June 16, 1969 in the United States District Court, N. D. Ill. (Marovitz, J., and a jury) on charges of labor-dispute violence (Indictment no. 67 Cr 30). Their case is pending on appeal in the Seventh Circuit. The case involves issues of minifon-type monitoring similar to that in the instant *White* case; the electronic activity alleged by Pearl and Tanner pre-dated *Katz*. The electronic issues in the Pearl-Tanner case were duly preserved before and during trial. The Pearl-Tanner case also involves telephone surveillance similar to that in *White*, and these issues too were duly preserved. (Undersigned amicus counsel Abraham Glasser and Maurice Edelbaum represent Pearl and Tanner in the pending appeal in the Seventh Circuit, and were of trial counsel.)

Amicus Ralph Tropiano was convicted in December 1968 in the United States District Court, D. Conn. (Timbers, C.J. and a jury), of Hobbs Act extortion (Indictment, Crim. No. 12,201). The Tropiano case involves issues of minifon-type surveillance as well as telephone surveillance similar to those in *White*, all of which issues were duly preserved on Tropiano's behalf at the trial. The electronic activity in the Tropiano case took place in March and April, 1967 (pre-*Katz*). The Tropiano case is pending on appeal before the Second Circuit; it was argued July 24, 1969. (Undersigned amicus counsel Abraham Glasser is Tropiano's attorney in the appeal before the Second Circuit.)

In view of the existence in all of the above cases of electronic issues similar to those in the instant *White* case, and in view of the fact that undersigned amicus counsel Messrs. Edelbaum and Glasser respectively represent the

above named amici in their own respective cases and may be in a position to make an amicus briefing contribution in the instant *White* case, we (Messrs. Edelbaum and Glasser) sought and obtained the consent of the *White* case parties for the filing of this amicus brief; in our letters to the Solicitor General and to Mr. White's counsel requesting such permission, we presented substantially the foregoing facts.

Summary of Argument

The within amici curiae argue in this brief (1) that the uncompromisable supremacy of the social-constitutional value of individual human privacy against police electronic intrusion requires a ruling that the Fourth, Fifth and Ninth Amendments absolutely outlaw all such police activity for prosecutorial purposes, including so-called one-party-consent electronic monitoring; and (2) that, regardless of any retroactivity-prospectivity impingements as such, the judgment below should be affirmed either because *Katz* v. *United States,* 389 U. S. 347 and *Osborn* v. *United States,* 385 U. S. 323 govern this case and need no "retroactivity" holding here because those decisions merely applied pre-existing law of the Fourth Amendment, or because in any event the above-mentioned social-constitutional "value judgment" in favor of privacy *now* compels the same result irrespective of precedent.

ARGUMENT

Introductory to Argument

The Seventh Circuit decision in this *White* case attainting one-party-consensual* electronic monitoring may well

---

* We are aware that respondent White herein challenges the constitutional adequacy of the Government's record-showing of "consent" by the informer, and we agree with respondent. Our own presentation in this amicus brief proceeds mainly on the *arguendo* assumption that such informer-consent is adequately established, but we also submit that the doubts as to such "consent" in this case must affect the ultimate disposition of the Fourth and Fifth Amendment issues herein.

stand solitary of support in other federal appellate jurisdictions as the Government claims (Brief For The United States, in *U. S.* v. *White,* No. 46, p. 20, n. 5).* Nevertheless, the vagaries of constitutional litigation have now brought it about that even though heretofore there has appeared to be small chance of a grant of certiorari to test out this one-party-consent issue at the behest of a criminal-defendant certiorari-petitioner, the issue has now been accepted for consideration on the merits by this Court at the behest of the Solicitor General in this *White* case, where the Seventh Circuit has administered to the Government its apparently solitary appellate rebuff in this area of electronic monitoring.

Now that this issue is before the Court on the merits, it is well to begin by noting exactly how this *White* case issue stands in the overall relevant constitutional perspective of the Fourth-Fifth Amendment "electronic" developments of the past few years. *White* poses, in one ultimate form, the constitutional policy question of individual human privacy *versus* governmental electronic intrusion. The *White* issue is "ultimate" because of the one-party consent factor. *Silverman* v. *United States,* 365 U. S. 505, and *Clinton* v. *Virginia,* 377 U. S. 168, settled that electronic monitoring done through "trespass" or in a "constitutionally protected area" violates the Federal Constitution. *Berger* v. *New York,* 388 U. S. 41, settled that advance judicial orders permitting eavesdrops of the latter categories must comply with the Fourth Amendment.

---

* But see *United States* v. *Missler* (C. A. 4, decided August 25, 1969—Sobeloff, J.), 5 Criminal Law Reporter 2405, September 3, 1969, referring to this one-party-consent issue and stating that "This debate is likely to remain unresolved until the Supreme Court furnishes additional guidance. In this regard, we note that certiorari has been granted in White. * * *"

Katz v. *United States*, 389 U. S. 347, eliminated the tests of "trespass" or of "constitutionally protected area", and ruled that the Fourth Amendment applies to any electronic auditing by "the uninvited ear" regardless of place. What gives this present *White* case its "ultimate" character is that the *White* facts—like the facts in the cases of all of the within amici (except amicus Desist)—present the question of whether monitoring done with the aid of some form of "one-party consent" falls within the *Katz* ban against "the uninvited ear".

We see several alternatives for approaching this one-party consent issue:

(1) *Berger, supra*, may be read as having set up Fourth Amendment tests for eavesdrop "warrants" which would practically make such "warrants" impossible to obtain. However, *Katz*, we realize, apparently contemplates the practical feasibility of such warrants—and pre-*Berger* the Court had approved *ad hoc* one such warrant, in *Osborn* v. *United States*, 385 U. S. 323.* Nevertheless, there is one way in which the situation as of the time of *Berger* may now again become relevant for consideration. We refer to the fact that in *Berger* the petitioner Ralph Berger had asked this Court to outlaw any and all electronic monitoring except in cases of extremest public emergency and even then to outlaw it for prosecutorial purposes (*Berger* v. *New York*, No. 615, Oct. Term 1966, Brief For Petitioner, pp. 15-51). The Court in *Berger* did not adopt the latter suggestion, nor has the Court pursued that direction since *Berger*, but we (the amici herein) now respectfully urge renewed consideration of this approach, and we present argument in support thereof in our Point I, *infra*.

---

* We discuss the *Osborn* case more extensively *infra*.

POINT I

Individual human privacy has or should have the supreme value in humanistic, democratic society of the modern western type. This "value judgment" should be made controlling, as a matter of constitutional policy, in all cases of governmental electronic intrusion against private individuals. Except perhaps for situations of supreme public necessity involving the physical safety of the nation or of a particular populated community or vital public installation, and even then only for purposes of preventive security action by responsible governmental agencies at the highest level rather than for obtaining of prosecutorial evidence, no electronic eavesdropping—including methods involving no "tangible" physical intrusion in the conventional senses, and including so-called one-party-consent intrusions—can be constitutional under the Fourth, Fifth and Ninth Amendments.

(As stated at p. 7, *supra,* the present amici are renewing in this brief the argument of petitioner Ralph Berger in *Berger* v. *New York, supra,* which is summarized in the above point heading. Our ensuing argument on this point is taken largely (and substantially *verbatim*) from the Brief For Petitioner in *Berger,* pp. 15 et seq., *passim;* undersigned amicus counsel Abraham Glasser wrote the *Berger* brief, so while we may here be burdening the Court with a repetition, we are not plagiarizing.)

The "Philosophy" Of Electronic Eavesdropping And The Constitutional Values Which It Challenges Even When It Is Done With So-Called One-Party Consent.

It has been well said that our constitutional search and seizure provisions "did not confer a right upon the people. * * * The right guaranteed was a right already belonging to the people. It was a precautionary statement of a lack of federal governmental power, coupled with a rigidly restricted permission to invade the existing right. * * * To view the amendment as a limitation upon an otherwise unlimited right of search is to invert completely the true posture of rights and the limitations thereon." *District of Columbia* v. *Little*, 178 F. 2d 13, 17 (C.A. D.C., 1950), aff'd 339 U. S. 1.

In other words, it is not, in any particular instance, the right to be let alone in one's privacy which has to prove itself as against offered intrusion; it is, rather, the searcher's or demandant's intrusion which has to be shown to be justifiable as against the traditionally, nay the axiomatically presumed "right of the people to be secure in their persons, houses, papers, and effects." U. S. Const., Amdt. IV.

So fundamental to our democratic-humanistic system is the right of individual privacy that, willingly facing a possible taunt of Transcendentalism, the constitutional lawyer may venture to characterize the right of privacy as "pre-constitutional", or "supra-constitutional".

The right of the individual to be free of unwarranted police intrusion against his privacy does not always receive, in practice, the protection which its express constitutional character (not to say its "pre-constitutional" character) would seem to require. The scope and the connotations of this right are matters of widespread and intense

controversy at the present time perhaps more than ever before, as the competing claims of the apace-advancing technology of electronic spying are pressed by proponents of police authority. The instant case brings this controversy before this Court in an issue-setting which, as above said, poses the constitutional problem of electronic eavesdropping in the most ultimate form in which it has thus far come before this Court, *viz.*, one-party-consent eavesdropping done without a judicial "warrant".

The circumstance that at a particular juncture in constitutional history a fundamental precept of the Constitution is under strong attack may reflect either that the evolving character of the Constitution is readying for a wholesomely needed mutation or variation, or that a wholesome constitutional stability as to the matter in question is being threatened and that steadfastness is needed to repel the threat. At such crucial junctures in this country's history it has more than once been the special responsibility of this Court to try to determine correctly, for the good of the Nation, which of the alternative dynamics just mentioned is operating in the particular confronting situation.

There is perhaps a still profounder way in which one may understand how this Court's unique role may be called into functioning at these supreme junctures in the continuing course of our constitutional evolution. One may speak of two classes of great constitutional "verities" under a system of our American type. First, there are those great constitutional "verity" rules which at some fairly defined point in time may be said to have attained their maximum fulfilled *vitality*, as an accomplished constitutional and social fact, through the decisional pronouncements of this Court in the first instance and through their subsequently having become accepted

as a practical working reality throughout the country at large. Second, there are those other likewise great constitutional "verity" rules, affecting matters which may be equally as important as those involved in the rules of the first class just mentioned, but which are still evolving, both as to the form and the firmness of their enunciation by this Court and as to the extent of their practical acceptance by the country.

The rules of the first class, the great constitutional "verity" rules whose axiomatic acceptance has become an accomplished historical fact in the country's life and thought, have always been most rare when what was involved was some really basic question of social "value judgment", and even rarer when the "axiomatic" value judgment involved has embraced some really integral matter of social ethics or social philosophy, i.e., when what was at stake has been the basic constitutional arrangements for administering the relationship between government and individual in the interests of either preserving or changing the essential "power" structure of the country's social system or its attendant system of moral assumptions—in a word, when what has been involved is that ultimate polity choice, Liberty or Authority.

The rarity of this kind of universally accepted social-governmental "value axiom" is, of course, a fact not confined to the scene of our own constitutional history. The instances in history generally, or, more pertinently, in the history of modern Western man, in which the ultimate consensus of an informed democratic citizenry has produced virtual dogma-accepted unanimity on any such fundamental question of value judgment in matters of liberty-versus-authority may probably be counted on the fingers of one hand.

One such instance which comes to mind is the apparent consensus of decent mankind that human chattel slavery is wrong. Another instance, in our own constitutional system, is that criminal prosecution and punishment without judicial trial are wrong.

It is difficult to think of other examples of social "dogma" in matters of individual constitutional right that enjoy practical unanimity or undisputed acceptance even among democratically organized peoples like ours who operate under a system of constitutional limitations imposed upon a theoretically *plenary* "parliamentary sovereignty". That is, aside from the two instances above mentioned—abolition of slavery, and the right of judicial trial on a charge of crime—it is difficult to think of any other constitutional rights of the individual as to which significant opposition is practically non-existent. In this country no serious person, or no person worth being seriously listened to, stands up any longer to favor slavery or criminal punishment without trial.

On the other hand, restrictions or qualifications continue to be favored in more or less significant and responsible ways as regards other individual rights usually thought of as basic. Even the principle of universal adult suffrage, the supposed *sine qua non* of democracy and of its sister doctrine popular sovereignty, has never ceased to be directly or indirectly resisted, and from time to time rendered *pro tanto* ineffectual, at the hands of influential elements in the modern democratic nations. One may likewise think of other examples among our theoretically basic constitutional principles which deserve or may deserve total acceptance and total effectiveness but do not yet unqualifiedly have such status and effect as a practical matter—e.g., free speech and free press, unqualified freedom from racial discrimination, and unqualified freedom from compul-

sory self incrimination (as against the compulsions of "immunity" laws); even freedom of thought in matters of religion (or irrelegion) is far from having achieved total success against openly declared bigotry and ignorance.

Few indeed, then, in history have been the "social truths" of individual right whose unquestioned acceptance "all mankind cries out with one voice". And the short list of these universally accepted examples above suggested—again, we were not able to enlarge our list beyond the two unqualified examples given, involving slavery and criminal trial—has been the product of long evolution, an evolution moreover whose course in this country has indispensably needed spur and guidance from this Court.

We respectfully believe that the present case involves a social and constitutional principle of individual right which deserves to rank, in the Bill of Rights area, with the principles of abolition of human chattel slavery and the right to due process judicial trial before criminal conviction and punishment. In this matter of the right of individual privacy against improper police intrusion there is no more room, under our constitutional system, for arbitrary and secret use of governmental power, than there is room for instruments of "title" to or "conveyance" of human slaves, or for *lettres de cachet* or Star Chamber proceedings as "process" for criminal punishment.

At the very least, we submit that socially and constitutionally equal with these latter values (against slavery and arbitrary criminal punishment) is the value of the right of individual privacy against any conceivable intrusion except upon grounds shown in a conclusive and cogent way to be of the most uncompromisable necessity for the very existence and safety of the community.

It unfortunately tends to be easy, in particular social times and circumstances, to fall into a short-sightedness concerning the high value of individual privacy when challenged by assertions of "police" need. It is a commonplace idea, declared by wise minds many times in the history of human thought and human strife, that such short-sightedness or impatience in matters of liberty *versus* authority are a foremost peril to public morality and good social sense. This country at the present time is grappling in manifold ways with stresses of public morality and sensible social judgment to an extent probably unprecedented in our history. A principal area of these stresses involves the national "crime problem", or the concomitant problem of effective "crime-fighting" by police agencies. Unfortunately, this situation which, despite the unusual magnitude of crime incidence at present, might normally have a chance of being soberly regarded and administered in an enlightened manner by agencies and persons of good will, as a specifically defined problem of enforcement of criminal laws, has been tensionized far beyond sobriety and normality in the present-day national attitude by aggravations for which no one is to blame unless it can be said that History is to blame for man's woes or for particular intensifications thereof. The increase of population on the geometrical scale set by an implacable biology, the consequent sheer crowding in our massive urban environments, the continuing disparities between wealth and poverty, the corroding of individual character qualities as traditions give way to Science (or, all too often, to mere scientism), and perhaps above all the explosive dynamics of race as groups long resignedly subservient emerge into activism for good or ill—these are among the major factors which are hampering a sober and normal approach to the current "crime problem". Social historians would doubtedless add also the factor of

mass-and-individual personality stress, if not disintegration, which arises in an era like the present when physically violent strife occupies so large a portion of the mental and physical energies of even the most advanced nations through the instrumentality known as War.

Nor must it be forgotten, in this recital of the items upon which we ought all to reflect in trying to understand the present day issue of crime-fighting *versus* the Constitution, that the historical juncture in which we stand in this year 1969 is but relatively a moment removed, even in short range historical measurement, from that recent time when, as an entire nation, we succumbed to a shame for which the only "precedent" in our history is the episode of the Alien and Sedition Laws. The departure from law and steadfast democratic tradition which is inherent in manifestly oppressive methods of law enforcement is so fundamentally shocking that it is perhaps in the very enormity of this shock that we must search for explanation of the astonishing indifference and insensitivity which so much prevail in some quarters of this country today concerning these matters. That certain Catalinian species of United States Senator who briefly held this country in terror and in thrall but a decade and a half ago did not fail of his purpose entirely, if we are correct in suggesting that the anti-rational and the anti-traditional precepts of constitutional immorality which at that time were infused into the minds of the citizenry are continuing to disorder the thinking of many people and to make it difficult to conduct temperate and rational debate on the contemporary constitutional issues of criminal law enforcement. We have no wish to draw the busy attentions of this Court into a re-living of the execrable days of the early 1950's in the respects to which we are here alluding, but we do not think that in connection with the present day

proposals for an unleashing of the "constitutional" Bloodhounds of electronic surveillance, it is important to remember those days and how their unwholesome effects continue to this time. It was in those days, not very long ago, that a visitor coming upon our scene could have readily imagined himself viewing a people gathered in a Colosseum to applaud the savagery of the Sovereign himself, as a people once applauded a Commodus.

If we may carry one step further the figure of speech just suggested, and in the same ancient language which framed and expressed the thought of the sometime noble thinkers of that sometime splendid bygone Civilization, one good way of expressing what this country needs today in the face of the police challenge to the right of individual privacy by electronic intrusion, is that this country would do well to hold in mind those ancient and grand words "*sub specie aeternitatis*". In a democratic society which professes fidelity to the principle of a written Constitution containing a Bill of Rights, in a country which affirms or professes to affirm the values connoted in such a constitutional charter of individual human liberties, the last thing that should be countenanced is, as we suggested at the outset of this Point I, an attitude of historical short-sightedness or impatience that might and probably must endanger the ancient verities and values codified in our Constitution as to the relationship between limitedly empowered government and the free citizen. Seldom if ever in our constitutional history has there been a more fitting and indeed a more necessitous occasion for conducting our constitutional discourse *sub specie aeternitatis*, than in the present debate over electronic police spying in derogation of the right of individual privacy.

* * *

In its brief on the merits in the instant case (Brief For The United States, p. 22), the Government argues that one-party-consent electronic monitoring of the type here involved "is usually limited to a discrete transaction and can reach only those conversations to which the informant is privy. There is also little likelihood that an individual will discuss confidential personal matters with an informant who is simply attempting to make an illicit purchase of narcotics."

A similar argument was offered by the respondent State authorities in *Berger* v. *New York*, *supra*, where they sought to justify the intrinsically unlimited character of the "search" involved in electronic room-eavesdropping by the analogy of the police searcher who must sift through innocuous materials in order to find the "specific" items allowed by the search warrant.

This amounts to suggesting that private individuals should accept the company (undisclosed and furtive) of police electronic auditors because the police eavesdroppers will be cocking their ears or animatedly alerting themselves only for "crime" during the auditory surveillance. This idea finds "precedent" in one "authority" that has come to our attention, namely, the late George Orwell's "1984", where everyone's home contained visual and auditory electronic installations by which "Big Brother" could keep himself continually apprised of all or any happenings in the private premises of the citizenry.

Indeed, the "Big Brother" system of "1984" was, in one pertinent analytical sense, less constitutionally pretentious (and offensive) than our contemporary one-party-consent system. In "1984" *everyone*—"Big Brother", all of his police henchmen, all informers, and all "subjects", in short everybody in the world—*knew* that the all-pervasive elec-

tronic surveillance was going on. Anything that anyone said in "1984" was, therefore, "consented to" by everyone for electronic auditing by "Big Brother". Thus, in "1984" there was not only "one-party-consent", there was *all-party*-"consent". Of course, this all-party-consent of "1984" was *coerced*, by the totalitarian coercions of that society. But what of the *coercion* in this present *White* case. Not only does the record disclose *zero* as to any supposed "voluntariness" of the "one-party-consenting" police informer, but (unlike "1984") the record here absolutely *negates* any such "consent", or even "knowledge", by the victim (Mr. White).*

It is worth examining in a little more detail the astounding suggesting that the private citizen ought not to mind living his private life under the potential, ever overhanging, "discrete" one-party-consent presence of the electronic police eye and ear, because in that way "crime" may be better detected. Who among us would *knowingly* accept such an atrocious invasion of our private homes and business places? Who among us would be consoled, in accepting such an insulting and intolerable intrusion upon our private lives, by the reassurance that the secret eavesdropper's attention would not be focused upon us in a "specific" way until we spoke a "criminal" word or did a "criminal deed"?

The foregoing is, in effect, the Government's own choice in this case, as to the best means of formulating the argument in favor of the electronic "one-party-consent" pretensions of the contemporary American police mentality. This draws the issue with unmistakable clearness. It is the issue of whether higher value attaches to individual

---

* Of course the same is true of all of the within amicus curiae victims or "subjects".

right and freedom in our society, or to the interests of police enforcement of the criminal laws. The extreme logic of the position preferred by the prosecutive authorities in cases like this one—that policing comes ahead of human private dignity—is in fact to be welcomed, because it shows to us, to all of us, to Judges and to lawyers and to laymen, where all this leads. We, respectfully say that where "all this leads" is, literally, to "1984".

Nowadays the literary image "1984" tends to obtrude beyond the realm of literature and to haunt men's minds as a day-to-day life reality the closer we approach in actual time to that dread "1984" year of Orwellian portent which now, in this year 1969, is a scant decade and a half away. Just how short a decade and a half can be in the time-experiencing consciousness of a human adult, especially in this pell-mell era, is acutely borne in upon us when we reflect that the *past* decade and a half started "only yesterday", in the year 1954, the but-yesterday-gone climatic year of "McCarthyism", the still freshly-felt first significant year of the "Warren Court", the year when we were all only fifteen years younger than we are now—and who of us, Judge or lawyer participating with each other in this present discourse, can avoid the poignant awareness that we would be hard put to it to tell ourselves satisfyingly that the last decade and a half of our lives felt like a long span in our lifetime, or that the next decade and a half will have for us a feeling of substantial span in lifetime terms?

Fain though we all be to say so, we all know we must eschew saying "Backward, O' backward go time in thy flight". But we also all know that "no power under Heaven" can thwart a *resolute* man from freely *determining* his own *volitional* part in the Future, as innumerable resolute men have done throughout history, and whose

creed in this regard was perhaps most tersely expressed by Martin Luther ("Here I stand. I can do no other".). The Justices of this Court are today the most important individuals on this planet for the fulfillment of this resolute volition to save mankind's future from the rule of the Electronic Brute.

We (undersigned amicus counsel) do not ask pardon for our foregoing rhetoric. Before this Bench one need never apolize for speaking on a plane *sub specie aeternitatis*. The very *raison d'etre* of a constitutional republic is its faith in eternal verities. And since the time of the Bill of Rights and the establishment of Judicial Review in *Marbury* v. *Madison*, 1 Cranch. 137, the humanistic verities expressed in the Federal Constitution have been a special charge of this Court.

We offer next some additional suggestions in support of the theme that the eternal Verity affirming the supreme Value of human individual privacy, is strikingly confirmed by the physical facts of Man's place in Nature:*

Whether or not one adopts a teleological view of the Universe, or of the place of Homo Sapiens in it, there are

---

* We might have mentioned at an earlier place in this pretentious-sounding argument on the "philosophy" of electronic spying, that we surely do not presume to stake out any claims of originality (in the sense of first discovery) in this essay treatment of the subject. And if this essay treatment of ours is lacking in scholarly annotations, it is not because we wish to deprive the Court of "research" leads, but because the topics being treated are of such a nature that scholarly annotation thereof would smack of pedantry. What we are trying to say in this footnote was much better said in Cervantes' preface to *Don Quixote*, where the author lamented that he might be charged with offering to the world nothing "but a dry, insipid Legend, not worth a Rush * * * without either Quotations on the Margin, or Annotations at the End, which other Books * * * have to set them off * * *. I want all these Embellishments and Graces * * *. I do not so much as know what Authors I follow * * *. [B]esides I am naturally lazy, and love my Ease too well to take the Pains of turning over Authors for those Things which I can express as well without it." *Miguel de Cervantes, Don Quixote (Ozell's Revision of the Translation of Peter Motteux)*, pp. xx-xxi (1930).

physical and physiological facts as to the nature of the world and Man's place in it which must be taken into account in any thoughtful consideration of the ultimate meanings of electronic intrusion upon individual human privacy. Aside from claimed instances of what has come to be known as "ESP", each member of our biological species goes about the daily course of his life pretty effectively secure in the knowledge that none of his fellows can probe his own secret mind. This opportunity which each human individual enjoys for preserving his inner autonomy of psyche or "soul" except as he voluntarily chooses to disclose it to or share it with others, is, in functional biological terms, the basis that enables each person to preserve his ultimately unassailable individual privacy if he has the wish and the will power to do so.

Teleologically considered or not, as we above suggested, this always invokable invulnerability of the private human mind, is a fact which intrinsically prevents or can prevent, in any instance, an unwanted intrusion upon one's individual privacy of mind or soul. Of course, we have now the atrocious phenomenon of chemistry known as the "truth drug"—atrocious, that is, when it is forced upon an individual without his free consent—but the atrocity of compulsory administering of a "truth drug" is something that we all know will never be countenanced in this country "while this Court sits". So that, it may be stated as a self-evident fact of human physiology and constitutional law that in this country there is no mortal power which can legally compel an unwilling individual to surrender the secrecy of his mind.

Why is not the situation exactly the same in regard to the physiological facts which nature has laid down in connection with the human sense organs of speech and hearing (and sight)? Absent artificial aids to the senses of

hearing (and sight), it has been from the beginning of man's existence a matter of sure knowledge on the part of each human individual that there are available to him fairly ready means of guarding his privacy of speech (and visibility) against unwanted intrusion. The person who does not want others to hear what he is saying (or to see what he is doing), has always been favored by an apparently wisely ordered Nature with easy facilities for preventing such intrusion—always, that is, until the advent of the technological spying devices of the present era which has given us electronic auditory methods, infra-red and photographic visual methods, and no one knows what other methods may be presently under way or may be yet to come as the ingenuity of science may contrive. Free of these technological espionage devices, an individual always could, and still can, preserve his privacy of speech and visibility against unwanted intrusion by various simple physical means of self-protective withdrawal or enclosure. But no such withdrawal or enclosure can necessarily avail against the insidious penetrations of today's electronic spying devices (or of the infra-red and photographing devices mentioned).

It is our respectful contention that any constitutionalizing of police-spying devices which would set at naught the physical and physiological boundaries that the facts of the natural world and of man's body have always provided as *ipso facto* protections for the ordinarily invulnerable privacy of each human individual, would involve so drastic, so far-reaching, so unpredictably destructive an overturning of the most fundamental arrangements for the ordering of decent human society, as to be unthinkable—not only constitutionally unthinkable, but above all unthinkable to anyone whose vision of Man is of a predominantly spiritual rather than of a predominantly material or carnal character.

Indeed, one does not have to be a teleologist avowing belief in man's destiny of progress or nobility, to be appalled at the threat of a technological obliteration of the protective arrangements that physics and physiology have formerly always assured in defense of the individual privacy of men's minds or souls. It is only necessary that one favor or desire, out of whatever existential or other philosophically arbitrary choice attitudes one may prefer, a continuation of the chance of each individual human being to go on having the effective right of private life, private speech and private thought which the natural facts of man's existence heretofore have made possible, to impel one into instantly and indignantly rejecting the idea of technological abolishment of the age-old privacy of the voluntarily controllable expression of one's vocal senses.

We have joined to our above discussion of the right not to have one's private speech electronically overheard, the theme of one's right not to be visually seen when one's preference of privacy is to the contrary. In thus enlarging the realm of our discussion, it has not been our thought, needless to say, to convey to this Court that we deem electronic eavesdropping to be inextricably bound up, for court decisional purposes, with all of those larger considerations of human sensory and mental privacy above mentioned. This case of electronic eavesdropping stands in the framework of its own constitutional issues. And yet, we have felt that, in the interests of a full exploration of the constitutional-philosophical connotations of the subject, it is our duty to speak in this brief along the broader lines above proposed.

In fact, it is because of our earnest belief that the specific constitutional problem which this case poses in regard to electronic eavesdropping, does unavoidably carry with it at least for purposes of larger perspective, the

epochally important topics of philosophical inquiry above sketched, that we suggested earlier in this portion of our argument that the ultimate issue of constitutional "value judgment" involved in this case of individual privacy *versus* police electronic spying is matched or surpassed in importance by perhaps only two other issues of constitutional "value" of the past, the issues of human slavery and of arbitrary punishment for crime.

* * *

The Government argues in this case—as do other contemporary proponents of one-party-consent electronic monitoring—that in the one-party-consent situation the problem is not unconstitutional invasion of privacy but "misplaced confidence". There are several answers to this.

First, what does the right of *conversational* privacy mean if it does not include the right to *converse,* i.e., to speak words *privately* to one or more other persons? Is the constitutional right of conversational privacy only the right to engage in a private soliloquy? We recognize that the possibility that the other party to a private conversation may later betray the speaker's "confidence" is just as much a reality of the life of man-in-the-physical-world as are the above mentioned nature-provided means for preserving one's privacy; we readily admit that the chance of such betrayal of confidence is as real a fact of life as are life's apparatuses for preservation of individual privacy when one wishes to do so. But, put an electronic "minifon" device on a police informer, and you have then and there stepped outside of both nature's provisions for preservation of solitary privacy and nature's tolerance for the predictable hazard of "misplaced confidence". Are the safeguards which immemorial nature has provided for the privacy of men's individual souls to

be allowed to be breached by new-fangled electronic mini-circuits and transistors? Shall this Court be remembered in future ages as the Body which had the power to refuse to allow enslavement of the human soul by electronic gadgetry but chose to let the police gadgeteers have their way?

Second, what, after all, is the known, predictable hazard of one's "misplaced confidence" in the situation above propounded? It is true that every criminal who deals with a confederate hazards that he is dealing with a then or future informer. This is a "known", "predictable" hazard for any criminal. Indeed it is a known hazard throughout all private conversational activity of men, non-criminal as well as criminal. It is one of life's most difficult arts to judge rightly whom to trust in imparting secrets, non-criminal or criminal. And it has ever been thus, since our species gained the power of speech, if not even in pre-speech times when men might communicate or manifest secret matters to each other by means other than "speech". But was it ever envisaged that the assumedly confidential listener acting as a then and there police agent, would actually *seize* the confidential words of the speaker by the means of an electronic *search? Is not this last the heart of the problem, the key to the analysis, of the one-party-consent electronic monitoring procedure?* Is not the dispositive *Fourth Amendment* consideration here that the so-called one-party-consenting *police agent* has been sent expressly to *seize* the confidential words of the speaker—to *seize* them on electronic tape or wire—and not merely to listen to the words with a view to later taking advantage of the speaker's "misplaced confidence"? Is it not the dispositive Fourth Amendment "constitutional fact" in such situations that the electronically equipped police agent has been sent by the police, *without any Fourth Amendment judicial warrant* (i.e., without de-

termination of probable cause by a judicial officer and without judicial specification of what is to be "searched" and "seized"), to carry out a *search* and a *seizure* of the Fourth Amendment-protected *speech* of a *person*—all in violation of the Fourth Amendment's protection of *"persons not places"* against the "uninvited ear"? In such a scene, is there any decently maintainable distinction, in Fourth Amendment terms, between (1) the police conduct of putting an "uninvited ear" electronic "bug" in a man's home or in his office or in his car or on top of a public telephone booth that he uses, and (2) the police conduct of sending to that man an electronically wired police agent or human "bug"? Is it not self-evident that in both of these forms of police conduct the ultimate result is to subject the unknowing, non-consenting speaker to the electronic "uninvited ear" of the police?

Third, in our preceding two paragraphs we have been speaking only of the "minifon"-type device, which records but does not transmit. Add to the foregoing that in this *White* case the device used was the Kel-type, which includes an electronic transmitter—add this, and you have for all practical purposes obliterated any meaningful remaining Fourth Amendment distinction between one-party-consent monitoring and the "uninvited ear". For, with the Kel device, the speaker whose private words are being electronically "searched" and "seized" is being surreptitiously subjected not only to the electronic equipment carried by the "misplacedly trusted" police agent, but he is also being then and there subjected to the surreptitious *presence* of the primary officers themselves who are listening in on the electronic transmission (and in all likelihood are furthermore electronically recording it). The Kel method of electronic monitoring renders the one-party-consent procedure the single most profound subversion of nature's above mentioned arrangements for both privacy and for limited tolerance of "misplaced confidence".

(We keep emphasizing the provisions that physical nature has made for the preservation of human individual privacy, because we are convinced (*supra*) that to destroy these natural arrangements would be to destroy human individuality itself.)

Fourth, if the "misplaced confidence" rationale has Fourth Amendment validity notwithstanding all of our above suggestions, then literally all and any kind of police electronic eavesdropping, "trespassory" or otherwise, has equal Fourth Amendment validity, all or any forms of the electronic "uninvited ear" have equal Fourth Amendment validity. For, the rationale in question says that a man's Fourth Amendment rights against electronic invasion of his conversational privacy are not violated when that man knows, or reasonably or predictably ought to anticipate the hazard, that he is being or may be electronically overheard. Well, in this electronic age, can any man claim "reasonable" or reasonably predictable expectation that he is not subject to some electronic monitoring, somewhere, sometime, including "trespassory" room-bugging and telephone wiretapping? This idea that we are not entitled to Fourth Amendment protection against electronic intrusion when we "reasonably" ought to know that somebody may be electronically auditing us, would be preposterous if it were not so abominable. This argument of the Government is one of those arguments that proves too much. The logical culmination of such an argument, or of the police procedures that eventually could evolve from the acceptance of such an argument by the Courts, is precisely that state of affairs in "1984" in which *everybody* has "knowledge" of "Big Brother's" universal electronic surveillance, *everybody* therefore who speaks in the environment of that known universal surveillance "impliedly consents" to be overheard, and everybody knows that the Fourth Amendment is dead—and that human individuality is dead.

POINT II

A. If *Katz v. United States*, 389 U. S. 347, is read as making the Fourth Amendment applicable to one-party-consent electronic monitoring of the type here involved, and if such applicability of *Katz* should be deemed nevertheless precluded in this case because of the "prospectivity" ruling of *Desist* v. *United States*, 394 U. S. 244, then the *Desist* ruling should be re-examined to determine whether the Court has dealt soundly with the the whole problem of retro-activity-prospectivity in the series of cases commencing with *Linkletter v. Walker*, 381 U. S. 618.

B. In any event, aside from problems of "retroactivity *versus* prospectivity" as such, *Desist* should be reconsidered in relation to *Katz* because *Desist* is unsound in failing to recognize that *Katz* applied pre-existing law of the Fourth Amendment.

C. In any event furthermore, the judgment in this *White* case should be affirmed on its particular facts—alleged one-party-consent monitoring by a Kel device*—on the authority of *Osborn* v. *United States*, 385 U. S. 323; and *Osborn* should be held to have applied the pre-existing law of the Fourth Amendment or, *via* a reconsideration of *Desist*, *Osborn* should be given "retroactive" effect.

The monitoring of the within petitioner White took place in December 1965-January 1966. *Katz* v. *United States*, 389 U. S. 347, was decided December 18, 1967. In

* We (amici) do not treat in this brief the additional monitoring of telephone conversations in this *White* case.

Desist v. *United States*, 394 U. S. 244, decided March 24, 1969, *Katz* was held applicable only to monitorings done after the date of the decision in *Katz* (December 18, 1967).

This Court's contemporary decisions on retroactivity-prospectivity commenced with *Linkletter* v. *Walker*, 381 U. S. 618, a Fourth Amendment case addressed to the question of the retroactive or prospective application of *Mapp* v. *Ohio*, 367 U. S. 643. In *Linkletter* the petitioner's case was not still pending on direct review when *Mapp* was decided. The holding of *Linkletter* was that the *Mapp* rule would not be given retroactive operation upon cases finally decided prior to the *Mapp* case, but the Court noted that in other cases it had in fact been applying the *Mapp* rule to cases still pending on direct review when *Mapp* was decided (381 U. S. at 622, n. 4).

After *Linkletter*, the next retroactivity-prospectivity decision by this Court in a Fourth Amendment case was *Desist*, dealing with the *Katz* rule,* and holding (as above

---

* *Fuller* v. *Alaska*, 393 U. S. 80, allowing only prospective application to *Lee* v. *Florida*, 392 U. S. 378, was not on its facts a Fourth Amendment case. *Lee* involved State telephone wiretapping which was held to be in violation of the Federal Communications Act (47 U.S.C. §605). *Fuller* involved State interference with the rights (under the Federal Communications Act) of the sender of a telegram.

Furthermore, there is a very grave question as to whether the grant of certiorari in *Fuller* was jurisdictionally improvident, so that *Fuller's* prospectivity ruling as to *Lee* may well be lacking in authoritativeness; this was urged in detail by the petitioners in *Desist* in their printed Joint Supplemental Reply Brief, pp. 12-22. We now respectfully urge the Court to re-examine this serious problem of the authoritativeness of *Fuller*, and to re-examine the last-cited Joint Supplemental Reply Brief in *Desist*.

mentioned) that *Katz* applies only to monitoring done after the date of the decision in *Katz* (December 18, 1967).

Thus, the only two precedent-setting* Fourth Amendment retroactivity-prospectivity decisions rendered by this Court, *Linkletter* and *Desist*, reached widely divergent results. In between *Linkletter* and *Desist* came several retroactivity-prospectivity decisions not involving the Fourth Amendment, but elaborately glossing, re-glossing and variously re-casting the whole judicial philosophy of the retroactivity problem. *Tehan* v. *Shott*, 382 U. S. 406 (rule of *Griffin* v. *California*, 380 U. S. 263, as to prosecutor's comment on defendant's failure to take the stand held not applicable to cases no longer under direct review at the time of the *Griffin* decision, but noting that the *Griffi* rule was applicable to cases still pending on direct review at the time of the *Griffin* decision—see footnote 3 in *Tehan*); *Johnson* v. *New Jersey*, 384 U. S. 719 (holding the rules of *Escobedo* v. *Illinois*, 378 U. S. 478, and *Miranda* v. *Arizona*, 384 U. S. 436, not retroactively applicable to cases in which direct review had been completed at the

---

* *Desist* was followed in *Kaiser* v. *New York*, 394 U. S. 280, decided the same day as *Desist* (March 24, 1969). The Government also suggests in its brief on the merits in this *White* case (*United States* v. *White*, Oct. Term 1969, no. 46, Brief For The United States, p. 29) that the *per curiam* affirmance in *Kaufer* v. *United States*, 394 U. S. 458, is likewise based on the *Katz*-prospectivity ruling of *Desist*, and we do not challenge this suggestion of the Government. We do respectfully challenge, however, the Government's further suggestion on the same page of its Brief just cited, that *Kaufer* gives precedental support to the Government's position on the Fourth Amendment merits (i.e., as distinct from the retroactivity problem) of the issue of one-party-consent monitoring. The only arguably indubitable "holding" that can be spelled out of *Kaufer* is the *Desist*-based prospectivity ruling regarding *Katz*.

respective times of those decisions, and holding those decisions applicable only to cases where trial commenced after the respective dates of those decisions); *Stovall* v. *Denno*, 388 U. S. 293, holding the "line-up" identification rules of *United States* v. *Wade*, 388 U. S. 218, and *Gilbert* v. *California*, 388 U. S. 263 prospectively applicable only to confrontations conducted after the date of the *Stovall* decision—this was the first emergence of the pure or "all-out" prospectivity rule); *Roberts* v. *Russell*, 392 U. S. 293 (holding retroactive the rule of *Bruton* v. *United States*, 391 U. S. 123, as to co-defendants' confessions); *DeStefano* v. *Woods*, 392 U. S. 631 (holding that the State jury trial rules of *Duncan* v. *Louisiana*, 391 U. S. 145 and *Bloom* v. *Illinois*, 391 U. S. 194, were prospectively applicable only to trials commenced prior to the date of the latter decisions); *McConnell* v. *Rhay*, 393 U. S. 2 (holding retroactive the rule of *Mempa* v. *Rhay*, 389 U. S. 128, that there is a right of counsel at probation revocation proceedings). Cf. (post-*Desist*), *Jenkins* v. *Delaware*, —— U. S. ——, 23 L. Ed. 2d 253, holding the *Miranda* rules inapplicable to re-trials commenced after the date of the *Miranda* decision.

In the retrospect of the above series of decisions from *Linkletter* to *Desist* and *Jenkins*, it is no wonder that Mr. Justice Harlan has protestingly stated, "Retroactivity must be rethought" (dissenting in *Desist*), and that "• • • the time has come for us to take a fresh look at the whole problem of retroactivity" (dissenting—*Jenkins* v. *Delaware, supra*).•

• In all respectfulness:—The marvel of this Court's doctrinal and formulary peregrinations through the labyrinth of "retroactivity", recalls the sense of marvel expressed in the words of Pere Gerard, the homespun sage of the French Revolution, who one day said to a gathering of his Jacobin Club colleagues, "When I first sat among you I heard so many beautiful speeches that I might have believed myself in heaven, had there not been so many lawyers present." *Encyclopedia Britannica*, Eleventh ed., article entitled "Jacobins", p. 117, fn. 1.

In the *Desist* case briefs for the petitioners in this Court undersigned amicus counsel Mr. Glasser presented extensive argument on the retroactivity problem that commenced with the *Linkletter* decision. We respetfully ask the Court to refer to those *Desist* briefs (*Desist* v. *United States,* Oct. Term 1968, no. 12, Joint Brief And Appendices For Petitioners (captioned as no. 909, Oct. Term 1967), pp. 51-89; *id., Joint Reply Brief For Petitioners,* pp. 2-19; *id., Joint Supplemental Reply Brief For Petitioners,* pp. 3-28; *id.,* Petition For Re-hearing, pp. 1-9, 10-11). We are presuming to ask the Court to examine the last-mentioned *Desist* case papers because those papers are believed to contain considerable analysis and discussion of authorities which are probably not available elsewhere, which are prodigiously too lengthy to repeat here or even to summarize effectively, and which could be helpful to the Court if the Court is disposed at this time to respond to Mr. Justice Harlan's call (*supra*) that "Retroactivity must be rethought".

Cardinal in the above mentioned *Desist* papers on the retroactivity problem were the following:

(1) When this Court announces a new rule of constitutional protection for criminal defendants the Court is necessarily saying that that is what the *Constitution itself* requires. Unless such newly announced constitutional interpretation is made "retroactively" applicable to all persons wronged by the prior constitutional interpretation (including even post-conviction applicants—see, again, Mr. Justice Harlan's dissent in *Desist*), the Constitution itself is being denied *prospective* application, and instead only the pronouncement of this Court has operative lefal effectiveness, not the pronouncement of the Constitution, which is instead being declared by this Court to be retroactively null and void. The essential point of constitutional analysis here is that in a governmental system like ours *legislation* must always be given

prospective effect, and the Constitution, being the highest form of "legislation" in this country, must be given "prospective" effect *from the time of its enactment* or from the time of enactment of any of its amendments. So that, when this Court announces the meaning of a provision of the Constitution, that meaning must be treated as having always rightly been such, during all the times that prior unfortunate persons had been denied the benefits of such meaning of the Constitution as *legislation* which has always been operative *ab initio* in accordance with its proper meaning, no matter how tardy this Court may have been in arriving at such proper meaning. For, to rule otherwise is not only grotesque in point of sheer constitutional-"legislative" theory, and is not only something that smacks of a form of "*ad hoc*"-ism bordering on opportunism, but is cruelly unjust and inhumane in terms of fundamental due process.

(2) This "ad hoc"-ism in the Court's retroactivity-prospectivity approach commencing with *Linkletter* is bad for the whole Public Morality of the country and for the character-fortitude of the Bench and Bar in this country, because, aside from its inhumaneness to individual litigating victims, it infuses into the functioning of this country's legal system, at the level of the Highest Court of the Land, an amorality (well intentioned but nonetheless an amorality) that defies the root principle of a civilized legal order, the principle of A Government Of Laws And Not Of Men. This peril, which, we repeat, we know is unintended by this Court needless to say, is not assuaged by its unintended nature, for, as Talleyrand once exclaimed, "Worse than a crime, a blunder".

(3) At the very least, a newly announced interpretation of the Constitution, for criminal cases, should be applicable to cases still in the process of pre-trial, trial or direct review, as was allowed by the Court when it first

commenced its recent retroactivity-prospectivity thinking in *Linkletter*. The "cost" to society through disruption or burdensomeness in allowing such still pending cases the benefit of the newly announced rule is insignificant when compared with the social cost of disintegration of the national Public Morality and the character-fortitude of the citizenry when amoral *"ad hoc"*-ism becomes "respectable".

(4) In any event the *Katz* case, as well as the *Osborn* case, should be construed as having applied the pre-existing law of the Fourth Amendment, *i.e.*, the problem of "retroactivity-prospectivity" is not necessarily apt to the *Katz-Osborn* rulings.

For all of the above enumerated topics which were extensively briefed by the petitioners in *Desist, supra*, except for the last of those enumerated topics (item "(4)"), we must here rest on those *Desist* papers, for the reasons above stated. But as to the above item "(4)", we submit further as follows:

As to the *Katz* decision, which was held purely prospective by the *Desist* decision, the herein relevant problem is, just when did the Fourth Amendment principle of *Katz* first really become articulately formulated in the decisions of this Court and just when did it receive authoritative or effective acceptance in the decisions of this Court? Is it correct legal history to say, as the *Desist* decision says, that the unqualified Fourth Amendment "uninvited ear" rule of *Katz* had not been effectively established in the decisions of this Court prior to *Katz*? We respectively take the position that *Katz* should be read as having made no significant innovation in the pre-existing law of the Fourth Amendment. There are overwhelming indications in the *Katz* decision that, already "built into" the language of that decision, so to say, is the assumption that the pre-existing law of the Fourth Amendment required the *Katz* ruling.

For example, see the Court's rejection in *Katz* of the Government's argument that because its agents had relied on *Olmstead* v. *United States,* 277 U.S. 438 and *Goldman* v. *United States,* 316 U.S. 129, the Court should retroactively validate the agents' conduct, the Court stating, "That we cannot do. * * * [T]he inescapable fact is that" the agents had chosen to decide for themselves, rather than presenting to "a neutral magistrate", the agents' claimed belief that they had probable cause to conduct their electronic activity.

It is strikingly pertinent to this last quoted language of the Court in *Katz,* that in the oral argument in this Court on October 14, 1968, in *Butenko* v. *United States,* No. 197, as reported in 4 *Criminal Law Reporter* 4053 (October 23, 1968, Vol. 4, No. 4, Section 4), the following described colloquy took place between the Chief Justice and the Solicitor General:

> "The Solicitor Genueral commented that in Katz, the electronic eavesdropping was legal at the time it was done.
>
> The Chief Justice noted that if that was true it would have been likely that the Supreme Court would have followed the precedent."

Further pursuing this same theme—of the "built in" recognition of the pre-existing law of the Fourth Amendment, in the *Katz* decision itself—*Katz* pervasively abounds, it is practically saturated, with items of ruling and reasoning which overwhelmingly bespeak that the Court in *Katz* conceived that essentially it was applying *existing* law of the Fourth Amendment, indeed that it was applying the single most vital Fourth Amendment principle, the very central axiom of the Fourth Amendment, long and unquestioningly assumed by everyone as being

the heart of the Fourth Amendment, namely, the requirement of advance judicial approval for a search warrant. Except for the fact that *Katz* also did involve an express overruling at last of *Olmstead* and *Goldman, supra,* one may read the *Katz* decision in vain for any hint that the Court deemed itself to be laying down "new law"; and as to those overrulings, the *Katz* decision strongly articulates also that *Olmstead* and *Goldman* had long since lost their authority by erosion effected through a series of pre-*Katz* decisions incompatible with *Olmstead* and *Goldman.*

Thus, at 389 U. S. 352, the Court in *Katz,* in rejecting the Government's test of "physical penetration", commented that this test "was *at one time* thought to" be controlling (italics added). Similarly, at 389 U.S. 353, the Court, again speaking in a past sense of constitutionally established principle pre-dating *Katz,* stated that this test "has been discredited", citing *Warden* v. *Hayden,* 387 U.S. 294, 304. In similar vein, i.e., referring to the "penetration" or "trespass" tests as having lost authority pre-*Katz,* the Court said of the *Olmstead* case that "we have since departed from the narrow view on which that decision rested", and then the Court went on to quote the well known language from *Silverman* v. *United States,* 375 U.S. 505, 511, rejecting the test of "technical trespass under . . . local property law" (389 U.S. at 353). Still again, in this same vein, the Court referred in *Katz* (389 U.S. at 353) to the pre-*Katz* non-trespass standards by speaking of them as a pre-*Katz* accomplished decisional fact, the Court using the language "Once this much is acknowledged" in referring back to those pre-*Katz* developments. Next, at 389 U.S. 353-354, the Court wrote the following words which, we submit, constitute the plainest possible speaking that so called non-trespassory electronic eavesdropping was violative of the Fourth Amendment pre-*Katz*:

> "We conclude that the underpinnings of Olmstead and Goldman have been so eroded by our subsequent decisions that the 'trespass' doctrine there enunciated can no longer be regarding as controlling. The Government's activities in electronically listening to and recording the petitioner's words violated the privacy upon which he justifiably relied while using the telephone booth and thus constituted a 'search and seizure' within the meaning of the Fourth Amendment. The fact that the electronic device employed to achieve that end did not happen to penetrate the wall of the booth can have no constitutional significance.
>
> The question remaining for decision, then, is whether the search and seizure conducted in this case complied with constitutional standards. * * *"

Immediately following the above quotation the Court in *Katz* went on to describe and consider the Government's position "that its agents acted in an entirely defensible manner" with respect to the above quoted question posed by the Court of "whether the search and seizure conducted in this case complied with constitutional standards" (389 U.S. at 354-355).*

---

* It deserves to be emphasized, we submit, that in the portions of the *Katz* decision above quoted and discussed, not only was the Court itself speaking of whether there had been compliance with "constitutional standards" plainly assumed to pre-date *Katz*, but also the Government in taking its litigational stand before this Court in *Katz* apparently found it appropriate to address itself to a showing that its agents had complied with pre-*Katz standards* that were not dependent on the "trespass" theory. We respectfully again emphasize, both this Court and the Government in *Katz* understood that one quite possible decisional direction portended by *Katz* was that this Court might well rule for petitioner *Katz* on the basis of pre-*Katz* non-trespass law; and in fact that was exactly what happened in *Katz* when the Court announced its decision (as we read the *Katz* case).

The thereafter immediately next following portion of the *Katz* decision (389 U.S. at 354-355), is too lengthy to quote here, as it includes extended footnotes by the Court; we summarize: The Court reasoned that, assuming the Government's agents had so behaved that they could have obtained a judicial warrant within the meaning of the pre-*Katz* decisions (the Court citing *Berger* v. *New York*, 388 U.S. 41; *Osborn* v. *United States*, 385 U.S. 323; *Ker* v. *California*, 374 U.S. 23; *Lopez* v. *United States*, 373 U.S. 427; *Nordelli* v. *United States*, 24 F. 2d 665), the conduct of the Government's agents nevertheless could not now be retroactively validated, for the reasons which we noted *supra*, *viz.*, that there had been no advance scrutiny and approval by a judicial officer on the issue of probable cause. In this last mentioned portion of the *Katz* decision the Court's reasoning in *Katz* struck perhaps its strongest note (as we earlier suggested) of insistence upon the applicability of the long-established pre-*Katz* Fourth Amendment standards (advance judicial approval of search warrants). This retrospectively established posture of the Fourth Amendment principles which the Court evidently deemed applicable in *Katz* is vividly expressed, for example, by the following language of the Court in which the Court spoke plainly in terms of pre-existing (i.e., pre-*Katz*) law (389 U.S. at 357):

> "* * * Over and again this Court has emphasized that the mandate of the [Fourth] Amendment requires adherence to judicial processes,' *United States* v. *Jeffers*, 342 U.S. 48, 51, 96 L. Ed. 59, 64, 72 S. Ct. 93, and that searches conducted outside the judicial process, without prior approval by judge or magistrate are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions."

In the above quotatoin in *Katz* we see the Court using such expressions as that "over and again" the Fourth Amendment requirement of "adherence to judicial processes" had been "emphasized" by the Court long before *Katz;* and that, apparently, so securely and long established had this pre-*Katz* Fourth Amendment principle become, that searches in violation of this principle—which the Court was declaredly applying in *Katz* as a principle declaredly long pre-dating *Katz*—or searches of the *Katz* type in violation of this principle were "per se unreasonable under the Fourth Amendment" (see the quotation immediately above).

Also interesting in the *Katz* decision—with reference to our same above theme that *Katz* was decided on pre-*Katz* Fourth Amendment law—is the portion of the *Katz* decision which follows immediately after our last given quotation, *supra.* That quotation ended, as seen, with a reference to "well-delineated exceptions", i.e., exceptions to the long-established Fourth Amendment principle requiring advance judicial approval for searches. The Court then went on (389 U.S. at 357) to point out that none of those exceptions could be applicable to electronic searches, and then the Court used the following significant language: "The Government does not question these basic principles. Rather, it urges the creation of a new execption to cover this case" (389 U.S. at 358). The "exception" which the Government wanted was that electronic surveillance of telephone booths should be exempted from "the usual requirement of advance authorization by a magistrate upon a showing of probable cause" (*ibid*). The Court rejected this request of the Government (*ibid*), but what we would here especially note is that, in this part of the *Katz* decision, there appears once again the absolutely taken-for-granted idea, on the part of both the Court and the Government, that the *Katz* electronic activity of the

Government's agents had to pass the muster of the pre-*Katz* Fourth Amendment "basic principles" (*supra*), and that the only escape from this for the Government in *Katz* would be "the creation of a new exception to cover this case" (*supra*). Could there be any clearer indication that the *Katz* decision was grounded on pre-*Katz* law? For indeed the Government itself implored the Court in *Katz* to law down a new, *prospective* "exception" to enable the Government to overcome the pre-*Katz* established law of the Fourth Amendment for the purpose of enabling the Government to win that case.

It is interesting also to trace the decisional history of the "trespass" theme which is said to have been authoritatively discarded only for the first time in *Katz*, but which we contend had lost any authoritative operativeness long before *Katz*. It is usually said that *Olmstead* and *Goldman* established the "trespass" rule. On re-reading *Olmstead* and *Goldman* one finds, however, that those cases did not "establish" the "trespass" rule. All that those cases did, in regard to the so-called "trespass" rule was that in their reasoning they spoke of a distinction between the respective fact situations there involved, and a "trespass" situation, but *Olmstead* and *Goldman* did not decisionally outlaw the "trespass" type of electronic instrusion. If the Justices will please re-read *Olmstead* and *Goldman* they will see that there is no *holding* in those cases that "trespassory" electronic monitoring is constitutionally bad; therefore, *Olmstead* and *Goldman* have never even needed to be "over-ruled" in the latter respect.

The first time, really, that "trespassory" electronic monitoring may be deemed to have been "held" constitutionally bad was in *Silverman* v. *United States*, 365 U.S. 505; or, rather, *Silverman* in "holding" that "trespass" is

indubitably bad, ruled also that the test of "trespass" was not going to be applied in a technical spirit, and that instead the test would be that of instrusion into a "constitutionally protected area".

This dilution, in *Silverman,* of the supposed "trespass" test underwent further dilution in *Wong Sun* v. *United States,* 371 U. S. 471.

All of this preceded *Katz* by several years. (See also our discussion of the *Osborn* decision, *infra.*)

We therefore submit that the touted idea that *Katz* for the first time made a radical departure, in Fourth Amendment terms, from some supposedly fixed concept of "trespass", is a myth, and that a critically careful reading of the pre-*Katz* decisions justifies if it does not compel interpreting *Katz* as having merely applied pre-existing Fourth Amendment law—as the Court itself in *Katz* so overwhelmingly indicated it thought it was doing (see our detailed analysis of the *Katz* decision, *supra*).

It remains to consider *Osborn* v. *United States,* 385 U. S. 323. Can there be any doubt that *Osborn,* decided in December 1966 (a year before *Katz*) portended, indeed decisionally anticipated or preempted, the outright articulation of the plenary "uninvited ear" principle of *Katz* and spelled the doom of the "trespass" test? Indeed, in *Osborn,* as here, the electronic device was concealed on the person of a police agent who, the "subject" thought, was a trusted associate of his. And still this Court in *Osborn* applied the Fourth Amendment requirement of an advance judicial "warrant". *It is not too much to say that Osborn, one year before Katz, laid down the same basic principle as in Katz, so far as concerns determination of the central issue in our case, namely, that the Fourth Amendment applies to so-called one-party-consent electronic eavesdropping.*

If we are correct in our above suggestions as to the impact of *Osborn*, the present case does not necessarily even turn at all on questions of retroactivity of *Katz*, and the judgment may be affirmed on the pre-*Katz* standards as most notably instanced in *Osborn*.

CONCLUSION

It is respectfully submitted that the judgment of the Court below should be affirmed.

Respectfully submitted,

ABRAHAM GLASSER
Attorney for Amici Curiae John G. Broady, Samuel Desist, Jack A. Pearl, Joseph Alfred Tanner, Ralph Tropiano.

MAURICE EDELBAUM,
Attorney for Amici Curiae John G. Broady, Joseph Alfred Tanner.

FILE COPY

SEP 16 1969

CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1969.

No. 69-13

UNITED STATES OF AMERICA,
Petitioner,

v.

JAMES A. WHITE,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

BRIEF FOR RESPONDENT.

MORRIS A. SHENKER,
JOHN L. BOEGER,
408 Olive Street,
St. Louis, Missouri 63102,
Attorneys for Respondent.

Of Counsel:
CHAUNCEY ESKRIDGE,
123 West Madison,
Chicago, Illinois.

St. Louis Law Printing Co., Inc., 611-15 N. Eighth St., 63101. 314-621-4477.

INDEX.

Page

Questions presented 1

Statement 3

Summary of argument 4

Argument 7

I. The record below and the government's statement of facts do not support the government's contention in its argument that the informant "consented" to the illegal eavesdropping 7

II. Respondent's Fourth Amendment Rights were infringed when government agents electronically and surreptitiously intercepted his private conversations without prior judicial approval and in violation of State criminal laws. This Court should, in the exercise of its supervisory powers, as a deterrent to similar affronts to proper law enforcement and to maintain the integrity and fairness of the administration of law, affirm the lower court's judgment reversing the convictions below 10

III. The Court's decisions in Katz v. United States, and Desist v. United States do not support the government's contention that respondent's Fourth Amendment rights protecting him against governmental intrusion by unreasonable search and seizure were not infringed 21

IV. The statutes under which respondent was convicted are invalid for the reason that they violate his rights afforded him under the Fifth Amendment of the Constitution of the United States 25

Conclusion 26

Cases Cited.

Amos v. United States, 255 U. S. 313, 317 8

Berger v. United States, 388 U. S. 41 ..... 4, 11, 12, 20
Bumper v. State of North Carolina, 391 U. S. 543 .. 5, 7, 8

Chimel v. California, 89 S. Ct. 2034 .....11, 14, 20

Desist v. United States, 394 U. S. 244 .... 5, 9, 13, 21, 23

Elkins v. United States, 364 U. S. 206 24

Gouled v. United States, 255 U. S. 298 ..... 5, 8, 9, 16
Grosso v. United States, 390 U. S. 62, 70-71 26

Harris v. United States, 8 Cir., 390 F. 2d 616 26
Hoffa v. United States, 385 U. S. 293 ..... 14, 15, 24

Irvine v. California, 347 U. S. 128 9

Johnson v. United States, 333 U. S. 10, 13 8
Judd v. United States, 190 F. 2d 649 8

Katz v. United States, 389 U. S.
347 ..... 5, 8, 11, 12, 13, 17, 21, 22, 23, 25
Kovach v. United States, 53 F. 2d 639 8

Lanza v. New York, 370 U. S. 139, 142 9
Lewis v. United States, 385 U. S. 206 ..... 14, 15
Linkletter v. Walker, 381 U. S. 618 .....22, 23
Lopez v. United States, 373 U. S.
427 .....10, 13, 16, 17, 18, 19, 24

McNabb v. United States, 318 U. S. 332, 341 24
Mesarosh v. United States, 352 U. S. 1, 14 24
Minor v. United States, No. 189, Oct. term 1969 ..6, 25, 26

Olmstead v. United States, 277 U. S. 438 24
On Lee v. United States, 343 U. S. 747 ....10, 13, 17, 18, 22
Osborn v. United States, 385 U. S.
323 ..... 4, 5, 10, 11, 12, 20, 21

People v. Dickson, 22 Ill. 2d 513, 177 N. E. 2d 224 23
People v. Kurth, 34 Ill. 2d 387, 216 N. E. 2d 154 24

Rios v. United States, 364 U. S. 253 24

Silverman v. United States, 365 U. S. 505 ..... 5, 9, 13, 15, 16, 21, 22
Simmons v. Bomar, 349 F. 2d 365 ..... 7, 8

Turner v. United States, No. 1474, Oct. term 1968..6, 25, 26

United States v. Jeffers, 342 U. S. 48, 51 .....11, 20
United States v. Jones, D. C., 292 F. Supp. 1001, 1008 8
United States v. Rivera, 2 Cir., 321 F. 2d 704 11

Wren v. United States, 352 F. 2d 617 7
Wong Sun v. United States, 371 U. S. 471 ..... 5, 9, 11

Statutes Cited.

21 U. S. C., § 174 .....2, 6, 25
26 U. S. C., § 4705 (a) 2, 6, 25

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1969.

No. 46.

UNITED STATES OF AMERICA,
Petitioner,

v.

JAMES A. WHITE,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

BRIEF FOR RESPONDENT.

QUESTIONS PRESENTED.

1. Whether respondent's Fourth Amendment rights, protecting him against governmental intrusion by unreasonable search and seizure, were infringed when government narcotic agents electronically and surreptitiously intercepted his private conversations without prior judicial approval and in violation of state criminal laws.

2. When the government seeks to rely upon consent of one party to a conversation to justify the lawfulness of an electronic search, does the government sustain its burden of proving that the alleged consent was freely and voluntarily given by merely showing that the person was "cognizant" of the eavesdropping?

3. Should this Court, in the exercise of its supervisory powers, and as a deterrent to government agents' surreptitious electronic surveillance of private conversations without prior judicial approval and in violation of state criminal laws, affirm the Court of Appeals' reversal of the convictions below?

4. Is the Fifth Amendment violated by a conviction for transferring narcotics without receipt of a written order form [26 U. S. C., § 4705 (a)], when that requirement is part of a statutory scheme compelling the respondent-transferor to reveal incriminating information?

5. Does the provision of Section 174, U. S. C., Title 21, stating that possession of a narcotic drug is sufficient evidence to authorize conviction thereunder unless the defendant explains the possession thereof to the satisfaction of the jury, unconstitutionally invade the defendant's privilege against self-incrimination?

6. Does the spirit of federal protection against double jeopardy preclude government petitioning of federal appellate courts for rehearing *en banc* of panel decision reversing respondent's conviction, especially where the rules of the Court of Appeals did not specifically provide for such a rehearing?

STATEMENT.

The respondent adopts the government's statement of facts with the exception of the following additions and corrections contained in this Statement and in respondent's Argument, *infra*. The government stated in its Petition for Writ of Certiorari (page 3) that the informant **consented** to the government's electronic eavesdropping. The respondent, in his Brief in Opposition, called this Court's attention to the fact that the record did not confirm the government's contention that the informant consented to anything, including the electronic eavesdropping. We now note that nowhere in the government's Statement contained in its brief on the merits does it contend that the informant consented to its illegal electronic eavesdropping. It should be noted however, that the government still persists in arguing at pages 2, 10, 12, 13 and 21 of its brief, that the informant consented to the government's placing the Kel device on his person. The government cites no page references to the record to support this contention.

At page three of the government's Statement, it states that "A single conversation in the respondent's home and a conversation in a restaurant were also overheard by means of the radio equipment." At page six of the government's Statement, it also refers to "a restaurant." Actually, "a restaurant" was the respondent's mother-in-law's place of business. The name of the restaurant was the Dining House Aluminer (Tr. 194, 564).

SUMMARY OF ARGUMENT.

I.

Respondent's conviction was based largely upon testimony by federal agents that they overheard incriminating statements, transmitted over the air by a "radio kel set" electronic eavesdropping device, made by respondent to a secret government informant. The conversations between the respondent and the secret government informant occurred in several locations including the respondent's home and automobile. The government had no warrant of any kind and the informant did not testify at the trial.

The Fourth Amendment prescribes a constitutional standard that must be met before official invasion of privacy is permitted, namely, a warrant. Here, there was no warrant, but only indiscriminate, uncontrolled use of an electronic device which falls squarely within the proscription of the Supreme Court in **Osborn v. United States**, 385 U. S. 323, cited with approval in **Berger v. United States**, 388 U. S. 41.

The thrust of the government's brief, including its "Questions Presented", relies upon a false premise, to-wit: that the informant "consented" to the government's illegal electronic eavesdropping. The record below and the government's own statement of facts do not support the contention that the informant "consented" to said eavesdropping. Additionally, the Court below specifically did not make a determination regarding the voluntariness of informant's participation in the government agent's scheme to illegally eavesdrop upon respondent's private conversation. Therefore, assuming *arguendo* that "consent" is material to the issues in this case, the record does not support the government's contention that the informant did consent to the illegal search. Also, it was

not respondent's burden to show that consent was **not** given, but it was the government's burden of proving at trial that the informant voluntarily consented to the illegal eavesdropping. **Bumper v. State of North Carolina,** 391 U. S. 543.

Thus, once it is recognized that the record does not establish that either party to the conversation overheard by the federal agents consented to the eavesdropping, it becomes clear that there is no logical distinction between the instant case and **Katz v. United States,** 389 U. S. 347, with the exception that in **Katz** the agents did not eavesdrop within a constitutionally protected area. Additionally, the government fails to cite any authority which holds that the government has the right to surreptitiously eavesdrop upon a conversation without the consent of either party to the conversation. Therefore, this Court should affirm the Court of Appeals' judgment. **Gouled v. United States,** 255 U. S. 298; **Silverman v. United States,** 365 U. S. 505.

II.

Assuming *arguendo* that the record in this case establishes that the informant did, in fact, freely and voluntarily consent to the unlawful eavesdropping, consent by an informant is not controlling in this type of case. **Osborn v. United States,** 385 U. S. 323, 329-330. The law is clear that the government has the burden of proving that its warrantless search is outside judicial process and conducted under such exceptional circumstances that it can validly claim exemption from the general rule that requires the obtaining of prior judicial approval. **Wong Sun v. United States,** 371 U. S. 471. This has not been done by the government.

Nor do the Court's decisions in **Katz v. United States,** cited *supra*, and **Desist v. United States,** 394 U. S. 244,

support the government's contention that respondent's Fourth Amendment rights, protecting him against governmental intrusion by unreasonable search and seizure, were not infringed. Additionally, the government agents' conduct in this case were in violation of criminal statutes of the State of Illinois. This Court should exercise its supervisory powers, as a deterrent to similar affronts to proper law enforcement and to maintain the integrity and fairness of the administration of law, and affirm the Court of Appeal's reversal of the convictions below.

III.

The statutes under which respondent was convicted, namely 21 U. S. C., § 174, and 26 U. S. C. 4705 (a), are invalid for the reason that they violate his rights afforded him under the Fifth Amendment of the Constitution of the United States.

Although respondent has never raised the invalidity of the above named statutes, this Court has granted certiorari in two cases to consider the statutes. **Minor v. United States**, No. 189, Oct. term 1969; **Turner v. United States**, No. 1474, Oct. term 1968.

ARGUMENT.

I. **The record below and the government's statement of facts do not support the government's contention in its argument that the informant "consented" to the illegal eavesdropping.**

The thrust of the government's brief, including its "questions presented," relies upon a false premise, to wit: that the informant **consented** to the government's illegal electronic eavesdropping. As shown in respondent's statement, *supra*, the record in this case does not confirm the government's contention that the informant "consented" to anything. Not only does the government fail to cite in its brief one page reference to the record supporting its contention, but the Court below never held that consent was in fact given. The opinion of the Court of Appeals sitting *en banc*, merely states that the informant was "cognizant" of the eavesdropping (App. 135; Pet. App. B, p. 23).[1] The Court below did not make a determination regarding the voluntariness of the informant's participation in the government agents' scheme to illegally eavesdrop upon respondent's private conversations (App. 136; Pet. App. B, p. 24, n. 5).

Thus, assuming *arguendo* that "consent" is material to the issues in this case, the record does not support the government's contention that the informant did consent to the illegal search. Nor was it respondent's burden to show that consent was **not** given. It was the government that had the burden of proving at trial that the informant voluntarily consented to the illegal eavesdropping. **Bumper v. State of North Carolina**, 391 U. S. 543; **Wren v. United States**, 352 F. 2d 617; **Simmons v. Bomar**,

[1] "App." references are to pages in the printed appendix filed in this Court. "Pet. App." references are to pages in the appendix attached to government's petition for writ of certiorari.

349 F. 2d 365; **Judd v. United States**, 190 F. 2d 649; **Kovach v. United States**, 53 F. 2d 639. The government's burden cannot be discharged by showing no more than acquiescence to a claim of lawful authority. **Bumper v. State of North Carolina**, 391 U. S. at 549; **Amos v. United States**, 255 U. S. 313, 317; **Johnson v. United States**, 333 U. S. 10, 13. Clearly, the mere knowledge by the informant that a radio device was attached to his person does not sustain the government's burden of proving voluntary consent. "Consent, as a matter of law, means something more than a willingness to cooperate or a formal document expressing consent." **United States v. Jones**, D. C., 292 F. Supp. 1001, 1008.[2]

Once it is recognized that the record does not establish that either party to the conversation overheard by the federal agents consented to the eavesdropping, it becomes clear that there is no logical distinction between the instant case and **Katz v. United States**, 389 U. S. 347. Nor does the government cite any authority which holds that the government has the right to surreptitiously eavesdrop upon a conversation without the consent of either party to the conversation.

Almost 50 years ago, this Court held in **Gouled v. United States**, 255 U. S. 298, that a conviction must be reversed where a government agent, pretending to make a friendly call upon the defendant, gained admission to his office and in his absence, without a warrant, seized several of the defendant's documents. The Court stated:

> "[W]hether entrance to the home or office of a person suspected of crime be obtained by a representative of any branch * * * of the government * * * by

---

[2] The defense was prevented at trial from cross-examining government agents about their relationship with the informant (Tr. 62-67, 88, 247-248, 254, 315, 332).

> stealth, or through social acquaintance, or in the guise of a business call, and whether the owner be present or not when he enters, any search and seizure subsequently and secretly made in his absence falls within the scope of the prohibition of the 4th Amendment * * *." 255 U. S. at 306.

This Court's holding in **Gouled** has never been overruled nor has its holding been attacked by subsequent decisions of this Court. Also, since the decision in **Gouled**, this Court has negated the belief that oral conversations can not be the object of a search or seizure. Clearly, such belief has not survived. **Silverman v. United States**, 365 U. S. 505; **Irvine v. California**, 347 U. S. 128; **Lanza v. New York**, 370 U. S. 139, 142; **Wong Sun v. United States**, 371 U. S. 471, 485-486; **Desist v. United States**, 394 U. S. 244, 89 S. Ct. 1030, 1033. Thus, under the rationale of **Gouled**, the instant surreptitious surveillance and seizure of private conversations fall within the scope of the prohibition of the Fourth Amendment.

The facts of this case present a situation no different than if a "bug" had been surreptitiously placed in the respondent's home, car, place of business, or placed in the informant's home without his consent. Here, the government conducted surreptitious surveillance of private conversations carried on in constitutionally protected areas. The government agents that overheard the conversations were indeed "outsiders." Here, as in **Silverman**, the conviction should be reversed because there was "an actual intrusion into a constitutionally protected area." **Silverman v. United States**, 365 U. S. at 512. For as Mr. Justice Douglas stated in his concurring opinion in **Silverman**, it is immaterial what kind of a device is used, but the important consideration is that the privacy of the home was invaded by the government.

For the reasons stated above, this Court's previous holdings in **Lopez v. United States,** 373 U. S. 427; **Osborn v. United States,** 385 U. S. 323; and **On Lee v. United States,** 343 U. S. 747, clearly do not support the government's contention that the instant surreptitious electronic eavesdropping is permissible. We submit that a reversal of this case would give the government the authority to coerce or pressure persons into spying upon their friends, associates, or even members of their own family. A reversal here would be a green light to the government to increase its use of spies, informants, and electronic devices, thereby coercing people to engage suspects in conversation in the privacy of their own home and use that person's private conversation to convict himself of a crime. Additionally, the government wants to be able to conduct such "dirty business" and "electronic snooping" without any judicial controls whatsoever or without probable cause (Gov. Br. 23). We submit that such a policy, whether carried out in this administration or in some future administration, would be a serious threat to the people of these United States, including each individual's rights under the First, Fourth and Fifth Amendments to the Constitution.

II. **Respondent's Fourth Amendment Rights were infringed when government agents electronically and surreptitiously intercepted his private conversations without prior judicial approval and in violation of State criminal laws. This Court should, in the exercise of its supervisory powers, as a deterrent to similar affronts to proper law enforcement and to maintain the integrity and fairness of the administration of law, affirm the lower court's judgment reversing the convictions below.**

Assuming *arguendo* that the record in this case establishes that the informant did, in fact, freely and voluntarily consent to the unlawful eavesdropping, respondent submits that "consent" by an informant is not controlling

in this type of case. **Osborn v. United States,** 385 U. S. 323, 329-330; **Berger v. United States,** 388 U. S. 41, 56. Further, the law is clear that the government has the burden of proving that its warrantless searches outside judicial process and without judicial approval were conducted under such exceptional circumstances that it can validly claim an exemption from the general rule that requires the obtaining of judicial approval. **Wong Sun v. United States,** 371 U. S. 471; **United States v. Jeffers,** 342 U. S. 48, 51; **Chimel v. California,** 89 S. Ct. 2034; **United States v. Rivera,** 2 Cir., 321 F. 2d 704. Not only does the record fail to show exceptional circumstances why the government failed to obtain prior judicial approval, but nowhere does the government argue that there were valid reasons for not obtaining judicial approval other than that the agents mistakenly thought it unnecessary. Also, the government does not attempt to justify its contention that in the future, government agents should not have to obtain prior judicial approval before conducting similar electronic surveillance. We submit that there are no overriding reasons for eliminating the necessity of obtaining prior judicial approval for any type of electronic snooping, including the use of electronic "bugs" on informants.

The government states that "the principal issue in this case involves the effect of the Court's decision in **Katz v. United States,** 389 U. S. 347, on earlier decisions . . ." (Gov. br. 12), and that **Katz** does not apply here for the reason that here, the informant **consented** to the eavesdropping. Thus, the government contends that whenever and wherever a person speaks to a third person, that third person can legally waive the speaker's Fourth Amendment rights and surreptitiously broadcast his words to the world without any judicial safeguards. Said contention is clearly erroneous and untenable.

In **Osborn**, the informant consented to the use of the electronic device, but this Court held that the "indiscriminate use of such devices in law enforcement raises grave constitutional questions under the Fourth and Fifth Amendments . . ." 385 U. S. at 329. Thus, the electronic recording by the informant was an invasion of the privacy protected by the Fourth Amendment, but the evidence was held admissible because of the prior authorization of the judges. **Berger v. United States**, 388 U. S. 41, 56.

The rationale of the decision in **Osborn** has not only been cited with approval by the majority of this Court in **Berger**, but has been cited with approval in **Katz**, 389 U. S. 347, 355. Nowhere in **Osborn**, **Berger** or **Katz** did this Court conclude that "consent" by a third person was material or determinative of the issues raised, as now claimed by the government. Additionally, this Court in **Katz**, stated: "But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." 389 U. S. at 351. Here, the record clearly shows and the Court below specifically found, that the respondent justifiably expected his conversations to be private (App. 140, Pet. App. B., p. 28). The Court below also found that the government agents recognized that the respondent sought to exclude their uninvited ears.

As stated in the opinion (*en banc*) below, "the surreptitious placing of the kel set on informer Jackson was for all conceptual purposes the same as the surreptitious wiring of the telephone booth in **Katz**" (App. 135-136). The electronic eavesdropping in **Katz** and in this case were both part of a "bugging" technique by which the conversations were transmitted to an "uninvited ear," to wit, government narcotic agents. The critical and determinative factor in both cases was that the respective **speakers** did not consent to the overhearing of their statements and same were unlawfully overheard by third per-

sons (government agents), uninvited by the speakers.[3] The situation here is no different than if an informant planted a radio transmitter inside a person's home, his car, etc., prior to engaging the speaker in conversation. In both instances the speaker, although agreeing to the informant's presence, does not agree, nor is he given a chance to disagree, with what would be the presence of someone else altogether. The determinative factor is that the invading microphone enabled third persons, about whom the speaker knew nothing, to be present at the conversations.

The government's argument that a person surrenders his right of privacy whenever he communicates his secret thoughts to a government informant was soundly rejected by Mr. Justice Brennan (joined in by Mr. Justice Douglas and Mr. Justice Goldberg) in his often cited dissenting opinion in **Lopez v. United States**, 373 U. S. 427, 449. Mr. Justice Brennan said: "the assumption, manifestly untenable, is that the Fourth Amendment is only designed to protect secrecy." 373 U. S. at 449. Obviously, if a person commits his secret thoughts to paper, that is no license for the police to seize the paper without proper judicial safeguards and "if a person communicates his secret thoughts verbally to another, that is no license for the police to record the words. Silverman v. United States, 365 U. S. 505." **Lopez v. United States**, 373 U. S. at 449. Respondent suggests that the rationale of Mr. Justice

---

[3] Additionally, as pointed out at pages 21-22, *infra*, in **Katz v. United States**, cited *supra*, and **Desist v. United States**, 394 U. S. 244, the government agents only used devices that permitted them to overhear sounds **outside of**, rather than **within**, the constitutionally protected areas. Here, the informant, without a warrant and without respondent's consent, surreptitiously brought the government agents with him into the protected areas to eavesdrop on private conversations. See Mr. Justice Burton's dissenting opinion in **On Lee v. United States**, 343 U. S. 747, 765.

Brennan's opinion applies here and should be followed by this Court.

Additionally, the government's "waiver" contention is untenable if considered in the light of other decisions by this Court. Suppose, for example, a suspect tells a secret government agent that he has narcotics hidden in his house. Obviously, the government must get a search warrant before it can search the house. The fact that the suspect speaks to the informant does not waive his Fourth Amendment rights. See **Chimel v. California**, 89 S. Ct. 2034, and cases cited therein.

The government's reliance upon this Court's decisions in **Lewis v. United States**, 385 U. S. 206 and **Hoffa v. United States**, 385 U. S. 293, is misplaced for those cases presented situations where there was no electronic interception or transmission of the defendants' words. Those cases merely hold that an informant is a competent witness to conversations and dealings with a defendant. Of course, here, the informant never testified, and the government did electronically intercept and transmit the respondent's private conversations.

In **Hoffa**, the Court recognized that the Fourth Amendment protections are not limited to tangibles, but extend to oral statements. 385 U. S. at 301. The Court held that the Fourth Amendment protects the security a man relies upon when he places himself or his property within a constitutionally protected area, be it his home, office or automobile. The Court stated that "There he is protected from unwarranted governmental intrusion." 385 U. S. at 301. Although the Court held that the informant was a competent witness to conversations with the defendant, the Court specifically held that the informant was not a "surreptitious eavesdropper." 385 U. S. 302. Here, the government agents were "surreptitious eavesdroppers" and

did intrude into constitutionally protected areas without any judicial controls.

In the **Lewis** case, the question for resolution was whether the Fourth Amendment was violated when a federal narcotics agent, by misrepresenting his identity and stating his willingness to purchase narcotics, was invited into the defendant's home where an unlawful narcotics transaction was consummated and the narcotics were thereafter introduced at defendant's criminal trial. 385 U. S. 206-207. In affirming the conviction, this Court held that the **Silverman** case was inapplicable because "there, the conduct proscribed was that of eavesdroppers, unknown and unwanted intruders who furtively listened to conversations occurring in the privacy of a house." 385 U. S. at 212. This Court quoted from the government's brief that in **Lewis**, there was no design on the part of the government agents to observe or hear what was happening in the privacy of the home and also that the informant did not see, hear or take anything that was not contemplated and in fact intended, by the defendant. Here, however, government agents did hear and take things away [respondent's conversation] that were not contemplated or in fact intended by the respondent. Thus, although the majority of the Court in **Lewis** apparently did not agree with Mr. Justice Douglas' reasoning in his dissent (i. e., that when the government plants a spy in the home of a person to obtain evidence, there is a search and therefore the Fourth Amendment should not be short-circuited), the majority opinion in **Lewis** is not controlling here.

Additionally, the **Hoffa** and **Lewis** cases do not apply here for in these cases the informant did testify at the trial and therefore, the Court's statements regarding the "misplaced trust" by the defendant applied to the informants who testified. Here, the respondent did not mis-

place his trust in persons who testified at trial for the witnesses were government agents who listened surreptitiously to private conversations from outside constitutionally protected areas, without respondent knowing they were eavesdropping on his conversations.

The government in its brief relies upon **Lopez v. United States**, 373 U. S. 427. However, the facts in **Lopez** are distinguishable to the facts here. First, the majority opinion in **Lopez** held that the informant did not violate the privacy of the office for the reason that he did not seize anything surreptitiously or without the defendant's knowledge. Thus, the Court in **Lopez** reasoned that the Court's previous decisions in **Silverman** and **Gouled** were inapplicable. Obviously, this distinguishes the instant case from **Lopez** for here there was a surreptitious seizure of respondent's conversations by government agents. Second, the majority opinion in **Lopez** held that the **Goldman**, **Olmstead** and **Silverman** cases were not in question because there was no eavesdropping in **Lopez** (the agent used a recording device). Here, however, respondent's voice was transmitted over the air to be heard not only by government agents, but by anyone else who happened to be tuned in on that specified radio frequency, thus, there was eavesdropping. Third, **Lopez** concerned the attempted bribery of an Internal Revenue Agent, known to the defendant to be a government agent. Also, in **Lopez**, the same government agent who recorded the defendant's conversation testified at trial, whereas, here the informant never testified at trial through no fault of the respondent and therefore was not subject to cross-examination.

It should be noted that Mr. Chief Justice Warren in his concurring opinion in **Lopez** stated that he thought the **On Lee** case was wrongly decided and should not be revitalized and that he would draw a distinction between

On Lee and **Lopez** as follows: First, in **Lopez** the known government agent was investigating the defendant and said fact was known by the defendant. Second, the known government agent used the recording device in **Lopez** to protect himself.[4] Third, in **Lopez**, the government agent testified at trial.

We submit that the distinction between **On Lee** and **Lopez** drawn by Mr. Chief Justice Warren is applicable here. For instance, here the informant did not testify at trial, but if he had testified, defense counsel could have explored the nature of the informant's friendship with the respondent, could have explored the possibility of other unmonitored conversations and appeals to friendships. Also, the defense could have cross-examined the informant on the issue of consent, police pressure brought to bear to persuade the informant to become a secret government agent, and the informant's own recollection of the contents of all the conversations between himself and the respondent. Indeed, the defense was prevented at trial from cross-examining agents about their relationship with the informant (TR. 62-67, 88, 247-248, 254, 315, 332).

The government argues that it did not purposely keep the informant off the witness stand, but seemingly blames the defense for not asking for a continuance. Obviously, it is not up to the defense to prepare the government's case, locate government witnesses, and to advise government counsel how to properly proceed with the prosecution. Also, as stated by Mr. Chief Justice Warren in **Lopez**, "It is no answer to say that the defense can call an informer * * * as a hostile witness." 373 U. S. at 445. Thus, although Mr. Chief Justice Warren concurred in **Lopez**, he was of the opinion that the informant must testify at the trial. He stated further:

---

[4] Mr. Justice Brennan in his dissenting opinion was of the opinion that the I. R. S. agent could always use the recordings to protect himself regardless of whether the evidence so obtained was admissible in a criminal trial.

> "Thus, while I join the Court in permitting the use of electronic devices to corroborate an agent under the particular facts of this case, I cannot sanction by implication the use of these same devices to radically shift the pattern of presentation of evidence in the criminal trial, a shift that may be used to conceal substantial factual and legal issues concerning the rights of the accused in the administration of criminal justice." 373 U. S. at 445-446.

Although the decision of the Court below did not suggest that this Court's decision in **Katz** overruled **Lopez**, respondent submits that the rationale of Mr. Justice Brennan's dissenting opinion in **Lopez** is applicable here and should be followed by this Court. Mr. Justice Brennan was of the opinion that **On Lee** was wrongly decided and should be considered overruled and that **Lopez** and **On Lee** are rationally indistinguishable. Thus, respondent submits to the Court that regardless of the distinguishing factors previously pointed out in this brief between **Lopez** and the facts in the instant case, this Court should review its prior decision and reconsider whether any type of electronic surveillance should be permitted without judicial safeguards.

It is no answer to say that there is no social interest in encouraging respondent and others to sell narcotics. For as stated by Mr. Justice Brennan:

> "Neither is there a social interest in allowing a murderer to conceal the murder weapon in his home. But there is a right of liberty of communication as of possessions, and the right can only be secure if its limitations are defined within a framework of principle. The Fourth Amendment does not forbid all searches, but it defines the limits and conditions of permissible searches . . ." **Lopez v. United States**, 373 U. S. at 450 (dissenting opinion).

The government at page 18 of its brief argues that the critical inquiry in this case is whether the policies of the Fourth Amendment protect a person's expectations that a secret informant will not be carrying a concealed transmitter supplied by federal agents. The government contends that the Fourth Amendment does not protect such an expectation. Respondent submits that although the risk of being betrayed by an informer or deceived as to the identity with whom one deals might be inherent in the conditioning of human society which we assume when we speak, electronic surveillance changes this risk. A person should not have to live in fear that every word he speaks might be transmitted or recorded and subsequently repeated to the world. As stated by Mr. Justice Brennan:

> "There is no security from that kind of eavesdropping, no way of mitigating the risk, and so not even a residuum of true privacy." 373 U. S. at 466.

Thus, if this Court should adopt the government's contention, respondent submits that all persons will have to assume that everyone is "bugged" and therefore no person will ever be completely free to speak. Such a result could very well be violative of every individual's rights under the First Amendment and the freedom of speech. In other words, the hazards of electronic eavesdropping are not merely that an individual criminal defendants' Fourth Amendment rights are violated, but that as a people, electronic surveillance could and does restrict people from speaking their minds and expressing their views on important matters. In the few years since this Court's decision in **Lopez**, it has been made public that the government has been conducting electronic surveillance of people all over these United States. Such vast government snooping has become of grave concern to many, including law-abiding citizens of these United States who are not concerned about hiding conversations concerning illegal activity.

The gist of the Fourth Amendment is the security of one's privacy against arbitrary intrusion by the police. We should not forgive the requirements of the Fourth Amendment, in the name of law enforcement. Affirmance of the Court of Appeal's decisions in this case will in no way impede law enforcement agencies. This Court indicated in the **Osborn** and **Berger** cases that if electronic surveillance is of a necessity then Congress should attempt to pass legislation which would permit said surveillance, but under proper judicial sanctions and safeguards. Although it may be that it is impossible to draft such legislation, respondent submits that this Court has indicated that such legislation might be drawn.

It was not solicitude for lawbreakers that caused the people of the United States to ordain the Fourth and Fifth Amendments as part of the Constitution. Criminals will not escape detection and conviction merely because evidence obtained by tapping telephone wires or using different types of bugs is inadmissible, if it should be so held; but, in any event, it is better that a few criminals escape than that the privacies of life of all people be exposed to the agents of the government, who will act at their own discretion, unauthorized and unrestrained by the Courts. Clearly, electronic surveillance, unrestrained by the Courts, is one of the most critical dangers to the people in these United States.

The government seeks authority to electronically overhear the conversations between people without the necessity of obtaining a warrant. We submit that if the government is allowed to conduct such electronic surveillance without judicial approval, then the only protection an individual might have regarding his right of privacy is to prevent the introduction of evidence seized without probable cause. This Court recently recognized in **Chimel v. California**, 89 S. Ct. 2034, 2042, that the Fourth Amendment interests are not vindicated even though the

rights of the criminal are protected against introduction of evidence seized without probable cause. This Court stated that "the Amendment is designed to prevent, not simply to redress, unlawful police action." 89 S. Ct. at 2042. Thus, the government should be required to go to a judge to obtain a warrant prior to making their electronic intrusion. This would help **prevent** unlawful police action. See also **Osborn v. United States.**

III. **The Court's decisions in Katz v. United States, and Desist v. United States do not support the government's contention that respondent's Fourth Amendment rights protecting him against governmental intrusion by unreasonable search and seizure were not infringed.**

The government contends that **Desist v. United States,** 394 U. S. 244, 89 S. Ct. 1030, requires this Court to reverse the lower Court's judgment. However we submit that **Desist** is not applicable here for if this Court should sustain the government's contention, the government will then be free to continue their indiscriminate and uncontrolled electronic eavesdropping. We submit that such a result would be untenable and that the right of privacy of millions of people would be infringed, regardless of whether they were actually eavesdropped upon by the government.

This Court's holding in **Desist v. United States** is not controlling here for the reason that here, not only did the government intrude upon private conversations, but actually intruded into a constitutionally protected area. **Silverman v. United States,** *supra.* In **Silverman** as well as in **Osborn,** the government agents overheard conversations within the constitutionally protected areas, whereas, in **Desist** and in **Katz,** the government agents merely overheard and recorded conversations which they were able to hear outside the constitutionally protected areas. Thus, in **Desist** and **Katz,** the defendants could seemingly have

prevented the government from overhearing their conversations by lowering their voices.

On Lee v. United States, 343 U. S. 747, is not directly in point with the facts here for the reason that here, as stated previously, the record does not show that the informant consented to the electronic eavesdropping. Thus, even assuming that the government was requesting this Court to review some of its earlier decisions concerning electronic eavesdropping, including the Court's decision in **On Lee**, the respondent submits that none of the previous cases cited by the government hold that evidence obtained in a manner similar to the method used here is admissible. For example, in **On Lee**, the informant was a paid government informer, and the electronically overheard conversations were corroborative of testimony given at trial by the co-defendant, who plead guilty and testified for the government. 343 U. S. 747, 193 F. 2d 306, 311. In **On Lee** either the informant consented to the overhearing, or the defense did not raise the issue of lack of consent by the informant. Clearly, the **On Lee** decision does not directly support the government's contentions here.

Without re-briefing and re-arguing the applicability of this Court's prior decisions on the retroactivity issue, which were thoroughly briefed and argued in **Desist**, respondent submits that this Court should not reverse the Court of Appeal's judgment. We submit that this Court's decision in **Linkletter v. Walker**, 381 U. S. 618 should be followed here and that **Katz** be held applicable here.

First, at trial, the defense objected and the trial Court overruled the defense's contention that the overhearings were illegally obtained. Then, the case was argued on appeal and submitted to the Court prior to the decision in **Katz**. The panel of three judges, relying on **Katz** then held that the trial Court was in error. Next, the Court sitting *en banc* held that prior case law and **Katz** required

that the trial Court's judgment be reversed. The government now contends that a subsequently decided case, **Desist**, should be applied here to reverse the Court of Appeal's decisions.

Although respondent is of the opinion that the rationale of **Linkletter** should be followed here, thereby applying **Katz** here, we submit that if the Court should decide otherwise, at a minimum, this Court should not penalize respondent just because his case went up on appeal after **Katz**. This Court should at least decide this case on its merits without relying on **Katz**. We can appreciate the difficulty the Court might have in trying to turn back the hands of time and decide such complex issues regarding electronic surveillance without considering recent case law. However, as stated previously, the government cites no case that is on all fours with the instant case. **On Lee** can be distinguished and clearly, the Court has not followed the holding in **On Lee**. Thus, until recent times, this Court has not reviewed many electronic surveillance cases and has never decided a case exactly like the instant case. Therefore, the government is mistaken when it suggests that this Court would have positively held for the government if this case had been reviewed prior to the decision in **Katz**.

The government suggests at page 29 of its brief, that neither the action of the government agents nor that of the informant was in violation of the Illinois Eavesdropping Statute. The government relies upon the Illinois Supreme Court's decision in **People v. Dickson**, 22 Ill. 2d 513, 177 N. E. 2d 224, which was decided in 1961, and decided that an electronically assisted overhearing does not violate the statute if **consent** is obtained from one of the parties to the conversation. Again, the government's argument is premised upon its contention that the informant **consented** to the illegal eavesdropping. Thus, knowing that the record does not support the govern-

ment's contention of consent, we submit that there is absolutely no doubt that the government agents and the informant were in violation of the Illinois Eavesdropping Statute. Also, in March, 1966, the Illinois Supreme Court in **People v. Kurth**, 34 Ill. 2d 387, 216 N. E. 2d 154, overruled so much of the **Dickson** opinion as permitted the introduction into evidence of a monitored conversation against the party whose consent had not been obtained. Thus, the decision in **Kurth** made it crystal clear that agents were in violation of the law regardless of whether the informant gave his **consent.**

Here, the federal agents were in criminal violation of Illinois State Statutes in their investigative work. Certainly, their conduct was "manifestly improper" within the meaning of **Lopez**. We submit that this Court should not condone government agents' intentional violation of law. **Elkins v. United States**, 364 U. S. 206; **Rios v. United States**, 364 U. S. 253. As stated in Mr. Justice Holmes' dissent in **Olmstead v. United States**, 277 U. S. 438, 485, "if the government becomes a law-breaker, it breeds contempt for law. . . ."

We urge this Court, in the exercise of its supervisory powers, that the electronic surveillance by the government here should be clearly prohibited by this Court. **Hoffa v. United States**, 385 U. S. 293, 315 (dissent); **McNabb v. United States**, 318 U. S. 332, 341; **Mesarosh v. United States**, 352 U. S. 1, 14.

Respondent submits that it would be better if this Court should decide this case on its merits as the law now stands, for the reason that the decision will have an important effect on the administration of criminal justice. If this case should be reversed, then the government will be free to continue widespread indiscriminate electronic eavesdropping without any judicial sanctions or controls. For this reason alone, this Court should consider the issues on its merits.

Additionally, there has been no claim by the government that there would be a large number of convicted felons affected by the retroactive application of **Katz** to cases on direct appeal at the time of the decision in **Katz**. Thus, if this Court should decide to determine the issue on the basis of general criminal jurisprudence and policy, then this Court should rule on the merits and decide whether federal agents can continue their uncontrolled bugging. However, if this Court should decide that this case should be looked upon as one single case, then we submit that the respondent will be discriminated against if this Court should reverse the Court of Appeal's decisions and hold that although the electronic eavesdropping here came some ten months after the eavesdropping in **Katz**, respondent must go to prison for the reason that his case did not reach the Supreme Court until after the **Katz** case was decided.

IV. **The statutes under which respondent was convicted are invalid for the reason that they violate his rights afforded him under the Fifth Amendment of the Constitution of the United States.**

Without arguing in detail, respondent submits that two of the questions presented in this case are identical to questions presented in two cases which will be heard by this Court during the present term. **Minor v. United States**, No. 189, Oct. Term, 1969; **Turner v. United States**, No. 1474, Oct. Term, 1968. Here, the respondent was convicted under 21 U. S. C., Section 174, which statute is under review in the **Turner** case.[5] Respondent was also convicted under 26 U. S. C., Section 4705 (a) which is under review by this Court in the **Minor** case. Respondent submits that it would not be inappropriate to consider this

[5] The trial Court below instructed the jury that "the defendant's possession alone raises a presumption that the heroin was unlawfully imported and the burden is then upon the defendant to rebut the said presumption . . ." (Tr. 679).

case on these two particular points at the same time the Court considers the **Minor** and **Turner** cases.

Although the respondent never raised the invalidity of the instant statutes at trial or in the Appellate Courts, respondent submits that this Court can properly decide such Constitutional issues here for there can be no waiver of a Constitutional privilege by one who does not know said privilege exists. See **Grosso v. United States**, 390 U. S. 62, 70-71; **Harris v. United States**, 8 Cir., 390 F. 2d 616.

CONCLUSION.

For the reasons stated herein, and in our Brief in Opposition, the respondent is of the view that the judgment below by the three judge panel of the Court of Appeals should be affirmed. Respondent recognizes however that the Court may wish to defer consideration of the questions presented concerning the validity of the two statutes under which respondent was convicted because the issues raised are presently pending in the **Minor** and **Turner** cases.

Respectfully submitted,

MORRIS A. SHENKER,

JOHN L. BOEGER,
408 Olive Street,
St. Louis, Missouri 63102,
Attorneys for Respondent
James A. White.

Of Counsel:
CHAUNCEY ESKRIDGE,
123 West Madison,
Chicago, Illinois.

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 46

UNITED STATES OF AMERICA, PETITIONER

v.

JAMES A. WHITE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY MEMORANDUM FOR THE UNITED STATES

This memorandum is submitted in response to the contention in respondent's brief (Br. 7–8) that the government's argument rests on the false premise that the informant *consented* to participate in the electronic monitoring.

1. The record shows that the informant, Harvey Jackson, actively worked with regular narcotic agents at his home and elsewhere for at least eight days (Dec. 9, 10, 11, 14, 28, and 29, and Jan. 5 and 7) over a period of approximately a month. Before each meeting with respondent, Jackson first traveled alone to a street rendezvous with the regular narcotic agents, who searched him for narcotics and strapped a trans-

368-241—69

mitting device to his person. On the four occasions that the informant drove to his own home to meet with respondent, an agent accompanied him (see, *e.g.*, A. 21). On the other occasions, the informant drove alone while an agent followed him in another car (see, *e.g.*, A. 50). After his meetings with respondent, Jackson returned to a rendezvous point, where he was again searched and the transmitting device removed from his person (see, *e.g.*, A. 29, 52–53). In all, there were at least eight occasions, between December 9, 1965 and January 7, 1966 that the informant went alone to have the transmitting device placed on his person.

It is clear that if Harvey Jackson had been a regularly employed government agent, there would be no substantial question, even in the absence of direct evidence of consent, that the overhearings were consensual. Where a regular employee of the government is outfitted with a monitoring device to be carried in the course of his assignment, the government is in effect a participant in the conversations and has itself authorized the radio transmission. See *Lopez* v. *United States*, 373 U.S. 427.

This same approach to the issue of consent is applicable in the present case. The informant Jackson was not employed on a single occasion, but was engaged to participate in a series of narcotics transactions. Although Jackson's employment was temporary, he performed services for the government on several occasions involving a high degree of risk. In these circumstances, there is no sound reason not to extend

to Jackson's activities the same inference applied in the case of a regular agent that the use of the radio transmitter was consensual. It is reasonable to infer that one who acts as an undercover agent for the government over a substantial period and who, as Jackson did here, worked without direct supervision of regular narcotics agents did so voluntarily. Indeed, in light of the many opportunities for the informant to cease his activities for the government, the extreme form of coercion which might have rendered his continuing cooperation involuntary is difficult to imagine.

It is frequently true that an informant's cooperation with the government, whether or not a monitoring device is used, may be motivated by a desire to avoid prosecution or to secure some monetary reward. But as the court said in *United States* v. *Zarkin*, 250 F. Supp. 728, 737 (D.D.C.):

> We can think of no time in which a party to a telephone conversation would permit the police to intercept that conversation when he, himself, would not seek something from the police in return, assuming he is of sound mind and knows that police are police. * * * However, so long as pressure is not initiated by the police for the purposes of overbearing the will of the party, this Court does not believe that the authorization given by the party is involuntary.

See also *McClure* v. *United States*, 332 F. 2d 19 (C.A. 9); *Good* v. *United States*, 378 F. 2d 934, 936

(C.A. 9).[1] The informant may also be motivated to carry the device for his personal safety. As we pointed out in our main brief, use of the device may help protect him both during a narcotics transaction, by providing a lifeline to nearby agents, and after such a transaction, by removing any reason to harm him in order to escape conviction. These motivations, however, do not suggest any violation of the Fourth Amendment rights of the person with whom the informant engages in narcotics transactions; with or without the device, the informant does not "see, hear, or take anything that was not contemplated, or in fact intended." *Lewis* v. *United States,* 385 U.S. 206, 210.

To be sure, there may be cases in which the informant was pressured to such an extent as to deprive him of his free will and make him the equivalent of a mechanical "bug" (see *United States* v. *Laughlin,* 222 F. Supp. 264 (D.D.C.)). Thus, where the circumstances of the informant's cooperation with the government give some indication that improper pressures may have been exercised, further inquiry is necessary. But, in the absence of such circumstances, which are not present here, there is no reason to assume that the informant has been coerced either to act as a government agent or to carry a monitoring device. See

[1] *United States* v. *Jones,* 292 F. Supp. 1001 (D.D.C.), on which petitioner relies, was, in our view, incorrectly decided, since there should be no question that a person, acting upon the advice of an attorney, can consent to the carrying of a monitoring device. The district court decision in that case is presently pending on appeal in the court of appeals. Compare *Good* v. *United States, supra.*

United States ex rel. Dixon v. *Pate*, 330 F. 2d 126 (C.A. 7).

2. Respondent neither moved to suppress any evidence under F. R. Crim. P. 41(e), nor did he suggest to the trial court that it hold a hearing outside of the presence of the jury to inquire into the circumstances under which the informant Harvey Jackson worked with the federal narcotics agents. Respondent's objections during the presentation of the government's evidence did not suggest that he believed that the cooperation of the informant was caused by governmental overreaching; indeed he made no specific claim of a Fourth Amendment violation in respect of the monitoring device until the close of the government's direct case.[2]

[2] As our main brief pointed out, respondent's initial objection to testimony from the agent who hid in the informant's kitchen closet was on the ground that respondent had "no way of telling what the conversation was" since the informant could not be located (A. 23–24). He next objected to testimony concerning a telephone conversation which the informant had allowed the same agent to hear on the ground that the telephone monitoring was a "violation of the law both of Illinois and federal law, and the Federal Constitution" (A. 26). When evidence was first introduced about what was heard over the radio receiver—agent DeFauw's testimony about the December 9 narcotics transaction—there was no objection (A. 40–44). When DeFauw testified that he overheard on the radio receiver the transfer of funds in the informant's home on December 10, respondent objected on the ground that "[t]his was a conversation over a radio and the objection was made before, your Honor, that the radio communication was in violation of the statute" (A. 46). (Our main brief at p. 8 erroneously states that there was objection to the first transmitted conversation instead of the second transmitted conversation). At the close of the government's case, respondent initially moved to exclude the radio conversations on the ground they violated the Illinois Eavesdropping Statute and the public policy of

Since respondent did not claim at trial that the monitoring was not consensual, the government's evidence did not focus on the conversations between the informant and the regular agents as to the arrangements regarding his carrying of the device. The first witness, Agent Carl Jackson, however, did testify, when questioned on cross-examination, that the informant gave him permission to hide in the closet (A. 40). He also stated that the informant gave him permission to monitor the first telephone call between the informant and respondent (A. 25).

In this Court, respondent seeks to profit from his own silence at trial by claiming that the record does not "confirm the government's contention that the informant 'consented' to anything," including the electronic eavesdropping (Br. 7). If respondent believed that his rights were violated by a nonconsensual overhearing, he should have raised that issue in the trial court. The government did not have to come forward and meet an issue not raised. *Bumper* v. *North Carolina*, 391 U.S. 543, is not to the contrary, since the defense in that case, by its motion to suppress evidence, raised the question of the constitutional validity of the search; and the issue of the householder's consent to the search, on which the State relied to establish its legality, was litigated at the hearing.

With respect to the claim that respondent "was prevented at trial from cross-examining government

---

the State of Illinois. After the prosecutor pointed out that the overhearing did not violate federal policy or federal law, the court denied the motion. Respondent then asked whether the court took into consideration both the Fourth and Fifth Amendments (A. 91).

agents about their relationship with the informant" (Br. 8, n. 2, 17), his transcript references (Tr. 62–67, 88, 247–248, 254, 315, 332), only show that the court sustained objections to a variety of defense questions. At no point however, do these questions indicate that the defense was trying to probe the issue of consensual monitoring. Indeed, respondent's silence on the issue at trial indicates that his present complaint is an afterthought.[3]

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

WILL WILSON,
Assistant Attorney General.

JEROME M. FEIT,
SIDNEY M. GLAZER,
Attorneys.

NOVEMBER 1969.

[3] Although we did not distinguish in our main brief between conversations overheard at the informant's home and elsewhere, we note that in *Alderman* v. *United States*, 394 U.S. 165, 179, n. 11, this Court implied that a person who converses in a home and is overheard has no valid objection if the owner or occupant of the premises consents to the surveillance.

U.S. GOVERNMENT PRINTING OFFICE: 1969

FILE COPY

Supreme Court, U.S.
FILED
APR 27 1971
E. ROBERT SEAVER, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 13

UNITED STATES OF AMERICA,
Petitioner,

v.

JAMES A. WHITE,
Respondent.

RESPONDENT'S PETITION FOR REHEARING

MORRIS A. SHENKER
JOHN L. BOEGER
408 Olive Street
St. Louis, Missouri 63102
314-CH-1-6116
Attorneys for Respondent

Of Counsel
CHAUNCEY ESKRIDGE
123 West Madison
Chicago, Illinois

St. Louis Law Printing Co., Inc., 411-15 N. Eighth St. 63101 314-231-4477

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 13

UNITED STATES OF AMERICA,
Petitioner,

v.

JAMES A. WHITE,
Respondent.

RESPONDENT'S PETITION FOR REHEARING

Respondent respectfully petitions the Court to set aside the opinion and judgment rendered herein on April 5, 1971 and to grant him a rehearing for the following reasons:

1. The writ of certiorari granted by this Court was not limited to a particular question. One of the questions presented which was contained in the government's petition for writ of certiorari was as follows:

> "Whether under the ruling in **Katz v. United States**, 389 U.S. 347, the district court should have excluded testimony by federal agents as to conversa-

> tions between petitioner and an informant which the agents overheard by means of an electronic device carried by the informant, **with the informant's consent,** but without obtaining a warrant'' (emphasis added).

As shown by respondent in his Brief in Opposition and in his brief on the merits, the record in this case does not support the proposition that the informant voluntarily consented to the electronic eavesdropping. And, as recognized by Mr. Justice White in the majority opinion, the Court of Appeals did not purport to make a finding of whether the informant voluntarily consented to the eavesdropping, although said issue was raised in that Court. We submit that this Court should rehear the case, decide the consent issue and not allow the instant important constitutional question to be decided on hypothetical and unsupported facts.

Failure to rehear this case will be an open invitation for Court of Appeals to decide and present to this Court, constitutional questions which are not supported by the record and therefore need not be decided by this Court. At a minimum, this Court should order the Court of Appeals to consider and decide the issues previously not decided by said Court, including the consent issue. Failure to review this case on the record would mean that respondent will go to jail for almost 25 years without the constitutional issues **presented in the record** ever being reviewed and decided by an appellate court. Such a result is untenable!

Additionally, if this decision stands, law enforcement officers all over the country will be free to violate state criminal laws and to coerce people into being electronically bugged informants and spys for the purpose of obtaining information desired by the police. Without any judicial safeguards, the desired information may or may

not be obtained from a person suspected of criminal activity. Such a result or even the **threat** of such repression is untenable and warrants the exercise of this Court's supervisory powers to review same.[1]

2. As explained by Mr. Justice Harlan, the majority's holding imposes on all citizens the risk of electronic eavesdropping without the minimum protection of a warrant or judicial safeguards. For now, all citizens must now measure their words more carefully, resulting in that communications will be inhibited. We must all now expect that our conversations are being transmitted and transcribed. This result is untenable for all persons count on the obscurity of off-the-cuff remarks which are protected by the very fact that our audience is limited. Now, as a result of the majority opinion, these values are sacrificed at the whim of police officers and a willing assistant or informant.

Criminals aren't the only ones that now run the risk of the unknown eavesdroppers, but every law-abiding member of society is subjected to the same risk. Thus, any informant working for federal or local police officers, who **listens** to a congressman, Judge, civil rights leader, military leader, political candidate or housewife, may now transmit and record said statement or conversations, without any judicial controls whatsoever. There are now no safeguards. Members of the House of Representatives, United States Senators, political candidates, critics of the present or future members of our country's executive branch of government and all law abiding citizens now know that every word they speak could legally be transmitted, recorded and preserved for future use at the whim

---

[1] Even if such conduct does not violate the Fourth Amendment, surely it is a more serious threat to our liberties than a technical "trespass". Thus, since this case involves a federal prosecution, this Court should prohibit electronic surveillance involved here in the exercise of its supervisory powers.

of the listener and any police officer. This clearly restricts freedom of speech and expression.

Subsequent to the time of oral argument in this case, some Congressmen and Senators have criticized the F.B.I. for its electronic eavesdropping activities. Although these men are public officials and therefore would normally expect a certain amount of invasion of their privacy, they apparently are of the opinion that innocent persons are threatened by such invasion or threat of invasion of privacy. The government disputes charges that they are using electronic surveillance except to investigate suspected crimes. This may or may not be true. If this is so, however, then why not at least require judicial supervision? Why doesn't our executive branch want judges to supervise the electronic eavesdropping? These questions are still unanswered.

Is it not within the realm of possibility that some federal, state, or local law enforcement personnel, many of whom are political appointees, might use this unrestricted power to spy on political opponents for the mere purpose of obtaining and preserving facts that might later become politically or otherwise embarrassing to the "bugged" victim? As Mr. Justice Douglas stated in his dissenting opinion, "Must everyone live in fear that every word he speaks may be transmitted or recorded and later repeated to the entire world?" (Dis. Op. 9). Although most law enforcement personnel are honest, hardworking, dedicated men and women, some have abused their privileges and power in the past and probably will do so in the future. Thus, the important consideration is that such personnel must not be given such unrestricted powers that the freedom of all law-abiding citizens is threatened.

We submit that the majority's opinion does permit law enforcement personnel; good or bad, federal or state, to

threaten the constitutional rights of all citizens. Why? The government claims that it is necessary in the interests of better law enforcement. But, as explained in the dissenting opinions, this Court could still permit eavesdropping and keep a free society and prevent the clear and present dangers of a police state by letting the judiciary take part in seeing to it that innocent and law abiding citizens are not the victims of oppression. The **threat** of **unrestricted** electronic eavesdropping, as condoned by this Court in its majority opinion, clearly strikes the fear into many law abiding citizens that a police state is now a clear possibility. As time goes by, this fear could become a reality.

3. The majority opinion without specifically stating so, in effect overrules many prior decisions of this Court that have upheld the importance of a determination by a neutral magistrate that probable cause exists, prior to a search and seizure. See **Chimel v. California**, 395 U.S. 752; **Wong Sun v. United States**, 371 U.S. 471. In those cases and cases cited therein, it was held that any warrantless searches without prior judicial approval must be conducted under such "exceptional" circumstances before the government can validly claim an exemption from the general rule that requires the obtaining of prior judicial approval. We submit that this case should be reheard to determine the effect of the instant ruling on the many prior decisions of this Court on this issue.

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for rehearing be granted and upon such rehearing the judgment below should be affirmed. In the alternative, and at a minimum, we submit that this Court should remand the case to the Court of Appeals with

specific instructions for it to rehear the case and decide the issues previously raised on appeal in that Court (including the issue of voluntary consent), but were not decided.

Respectfully submitted

MORRIS A. SHENKER

JOHN L. BOEGER
408 Olive Street
St. Louis, Missouri 63102
Attorneys for Respondent

Of Counsel:

CHAUNCEY ESKRIDGE
123 West Madison
Chicago, Illinois

Certificate of Counsel

The undersigned counsel respectfully represents in behalf of the respondent that the foregoing Petition for Rehearing is filed in good faith and not for the purposes of delay.

John L. Boeger
Attorney for Respondent

NOTE: Where it is deemed desirable, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

UNITED STATES *v.* WHITE

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 13. Argued November 10, 1969—Reargued October 20, 1970—Decided April 5, 1971

Respondent was convicted in 1966 of narcotics violations following a trial where evidence was admitted of certain incriminating statements of respondent that were overheard by warrantless electronic eavesdropping by Government agents by means of a transmitter which an informer consented to wear during his meetings with respondent. The informer could not be located at trial, and the trial court overruled objections to the testimony of the agents who conducted the electronic surveillance. Reading *Katz* v. *United States*, 389 U. S. 347 (1967), as overruling *On Lee* v. *United States*, 343 U. S. 747 (1952), the Court of Appeals held that the agents' testimony was impermissible under the Fourth Amendment, and reversed respondent's conviction. *Held:* The judgment is reversed. Pp. 2--.

405 F. 2d 838, reversed.

MR. JUSTICE WHITE, joined by THE CHIEF JUSTICE, MR. JUSTICE STEWART, and MR. JUSTICE BLACKMUN, concluded that:

1. The Government's use of agents who themselves may reveal the contents of conversations with an accused does not violate the Fourth Amendment, and this Court's decision in *Katz* v. *United States*, *supra*, does not disturb the rationale of *On Lee*, *supra*, in this respect and require a different result because the agent uses electronic equipment to transmit the conversations to other agents. Pp. 2–8.

2. The unavailability of the informant as a witness does not create any Fourth Amendment issue. P. 8.

3. Since the decision in *Katz* v. *United States*, *supra*, was not retroactive, *Desist* v. *United States*, 394 U. S. 244, the Court of Appeals erred in not adjudicating this case by the pre-*Katz* law

Syllabus

established by *On Lee* to the effect that the electronic surveillance did not involve a Fourth Amendment violation. P. 9.

MR. JUSTICE BLACK concurred in the judgment for the reasons set forth in his dissent in *Katz* v. *United States*, 389 U. S. 347, 364. P. 9.

MR. JUSTICE BRENNAN, to the extent that he joined in the Court's judgment, concluded that *Desist* v. *United States*, *supra*, requires reversal of the Court of Appeals' judgment. P. 1.

WHITE, J., announced the Court's judgment, and delivered an opinion in which BURGER, C. J., and STEWART and BLACKMUN, JJ., joined. BLACK, J., filed a statement concurring in the judgment. BRENNAN, J., filed an opinion concurring in the result. DOUGLAS, HARLAN, and MARSHALL, JJ., filed dissenting opinions.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 13.—October Term, 1970

United States, Petitioner, v. James A. White. | On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[April 5, 1971]

Mr. Justice White announced the judgment of the Court and an opinion in which The Chief Justice, Mr. Justice Stewart, and Mr. Justice Blackmun join.

In 1966, respondent James A. White was tried and convicted under two consolidated indictments charging various illegal transactions in narcotics violative of 26 U. S. C. § 4705 (a) and 21 U. S. C. § 174. He was fined and sentenced as a second offender to 25-year concurrent sentences. The issue before us is whether the Fourth Amendment bars from evidence the testimony of governmental agents who related certain conversations which had occurred between defendant White and a government informant, Harvey Jackson, and which the agents overheard by monitoring the frequency of a radio transmitter carried by Jackson and concealed on his person.[1] On four occasions the conversations took place in Jackson's home; each of these conversations was overheard by an agent concealed in a kitchen closet with Jackson's consent and by a second agent outside the

[1] White argues that Jackson, though admittedly "cognizant" of the presence of transmitting devices on his person, did not voluntarily consent thereto. Because the court below did not reach the issue of Jackson's consent, we decline to do so. Similarly, we do not consider White's claim that the Government's actions violated state law.

house using a radio receiver. Four other conversations—one in respondent's home, one in a restaurant, and two in Jackson's car—were overheard by the use of radio equipment. The prosecution was unable to locate and produce Jackson at the trial and the trial court overruled objections to the testimony of the agents who conducted the electronic surveillance. The jury returned a guilty verdict and defendant appealed.

The Court of Appeals read *Katz* v. *United States*, 389 U. S. 347 (1967), as overruling *On Lee* v. *United States*, 343 U. S. 747 (1952), and interpreting the Fourth Amendment to forbid the introduction of the agents' testimony in the circumstances of this case. Accordingly, the court reversed but without adverting to the fact that the transactions at issue here had occurred before *Katz* was decided in this Court. In our view, the Court of Appeals misinterpreted both the *Katz* case and the Fourth Amendment and in any event erred in applying the *Katz* case to events which occurred before that decision was rendered by this Court.[2]

I

Until *Katz* v. *United States*, neither wiretapping nor electronic eavesdropping violated a defendant's Fourth Amendment rights "unless there has been an official search and seizure of his person, or such a seizure of his papers or his tangible material effects, or an actual physical invasion of his house 'or curtilage' for the purpose of making a seizure." *Olmstead* v. *United States*, 277 U. S. 438, 466 (1928); *Goldman* v. *United States*, 316 U. S. 129, 135–136 (1942). But where "eavesdropping was accomplished by means of an unauthorized physical pene-

[2] A panel of three judges on March 18, 1968, reversed the conviction, one judge dissenting. A rehearing *en banc* was granted, and on January 7, 1969, the full court followed the panel's decision, three judges dissenting. 405 F. 2d 838 (1969).

tration into the premises occupied" by the defendant, although falling short of a "technical trespass under the local property law," the Fourth Amendment was violated and any evidence of what was seen and heard, as well as tangible objects seized, were considered inadmissible fruits of an unlawful invasion. *Silverman* v. *United States*, 365 U. S. 505, 509, 511 (1961); see also *Wong Sun* v. *United States*, 371 U. S. 471 (1963); *Berger* v. *New York*, 388 U. S. 41, 52 (1967); *Alderman* v. *United States*, 394 U. S. 165, 177–178 (1969).

Katz v. *United States*, however, finally swept away doctrines that electronic eavesdropping is permissible under the Fourth Amendment unless physical invasion of a constitutionally protected area produced the challenged evidence. In that case government agents, without petitioner's consent or knowledge, attached a listening device to the outside of a public telephone booth and recorded the defendant's end of his telephone conversations. In declaring the recordings inadmissible in evidence in the absence of a warrant authorizing the surveillance, the Court overruled *Olmstead* and *Goldman* and held that the absence of physical intrusion into the telephone booth did not justify using electronic devices in listening to and recording Katz's words, thereby violating the privacy on which he justifiably relied while using the telephone in those circumstances.

The Court of Appeals understood *Katz* to render inadmissible against White the agents' testimony concerning conversations which Jackson broadcast to them. We cannot agree. *Katz* involved no revelation to the Government by a party to conversations with the defendant nor did the Court indicate in any way that a defendant has a justifiable and constitutionally protected expectation that a person with whom he is conversing will not then or later reveal the conversation to the police.

Hoffa v. *United States*, 385 U. S. 293 (1966), which was left undisturbed by *Katz*, held that however strongly a defendant may trust an apparent colleague, his expectations in this respect are not protected by the Fourth Amendment when it turns out that the colleague is a government agent regularly communicating with the authorities. In these circumstances, "no interest legitimately protected by the Fourth Amendment is involved," for that amendment affords no protection to "a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it." *Hoffa* v. *United States*, at 302. No warrant to "search and seize" is required in such circumstances, nor is it when the Government sends to defendant's home a secret agent who conceals his identity and makes a purchase of narcotics from the accused, *Lewis* v. *United States*, 385 U. S. 206 (1966), or when the same agent, unbeknown to the defendant, carries electronic equipment to record the defendant's words and the evidence so gathered is later offered in evidence. *Lopez* v. *United States*, 373 U. S. 427 (1963).

Conceding that *Hoffa*, *Lewis*, and *Lopez* remained unaffected by *Katz*,[3] the Court of Appeals nevertheless read both *Katz* and the Fourth Amendment to require a different result if the agent not only records his conversations with the defendant but instantaneously transmits them electronically to other agents equipped with radio receivers. Where this occurs, the Court of Appeals held, the Fourth Amendment is violated and the testimony of the listening agents must be excluded from evidence.

To reach this result it was necessary for the Court of Appeals to hold that *On Lee* v. *United States* was no

[3] It follows from our opinion that we reject respondent's contentions that *Lopez* should be overruled.

longer good law. In that case, which involved facts very similar to the case before us, the Court first rejected claims of a Fourth Amendment violation because the informer had not trespassed when he entered the defendant's premises and conversed with him. To this extent the Court's rationale cannot survive *Katz*. See 389 U. S., at 352–353. But the Court announced a second and independent ground for its decision; for it went on to say that overruling *Olmstead* and *Goldman* would be of no aid to On Lee since he "was talking confidentially and indiscreetly with one he trusted, and he was overheard . . . . It would be a dubious service to the genuine liberties protected by the Fourth Amendment to make them bedfellows with spurious liberties improvised by farfetched analogies which would liken eavesdropping on a conversation, with the connivance of one of the parties, to an unreasonable search or seizure. We find no violation of the Fourth Amendment here." 343 U. S., at 753–754. We see no indication in *Katz* that the Court meant to disturb that understanding of the Fourth Amendment or to disturb the result reached in the *On Lee* case,[4] nor are we now inclined to overturn this view of the Fourth Amendment.

Concededly a police agent who conceals his police connections may write down for official use his conversations with a defendant and testify concerning them, without a warrant authorizing his encounters with the defendant and without otherwise violating the latter's Fourth Amendment rights. *Hoffa* v. *United States*, 385

[4] Other courts of appeal have considered *On Lee* viable despite *Katz*. *Dancy* v. *United States*, 390 F. 2d 370 (CA5 1968); *Long* v. *United States*, 387 F. 2d 377 (CA5 1967); *Koran* v. *United States*, 408 F. 2d 1321 (CA5 1969). See also *United States* v. *Kaufer*, 406 F. 2d 550 (CA2 1969), affirmed *per curiam*, 394 U. S. 458 (1969); *United States* v. *Jackson*, 390 F. 2d 317 (CA2 1968); *Doty* v. *United States*, 416 F. 2d 893 (CA10 1969) (rehearing).

U. S. 293, 300–303. For constitutional purposes, no different result is required if the agent instead of immediately reporting and transcribing his conversations with defendant, either (1) simultaneously records them with electronic equipment which he is carrying on his person, *Lopez* v. *United States, supra;* (2) or carries radio equipment which simultaneously transmits the conversations either to recording equipment located elsewhere or to other agents monitoring the transmitting frequency. *On Lee* v. *United States, supra.* If the conduct and revelations of an agent operating without electronic equipment do not invade the defendant's constitutionally justifiable expectations of privacy, neither does a simultaneous recording of the same conversations made by the agent or by others from transmissions received from the agent to whom the defendant is talking and whose trustworthiness the defendant necessarily risks.

Our problem is not what the privacy expectations of particular defendants in particular situations may be or the extent to which they may in fact have relied on the discretion of their companions. Very probably, individual defendants neither know nor suspect that their colleagues have gone or will go to the police or are carrying recorders or transmitters. Otherwise, conversation would cease and our problem with these encounters would be nonexistent or far different from those now before us. Our problem, in terms of the principles announced in *Katz*, is what expectations of privacy are constitutionally "justifiable"—what expectations the Fourth Amendment will protect in the absence of a warrant. So far, the law permits the frustration of actual expectations of privacy by permitting authorities to use the testimony of those associates who for one reason or another have determined to turn to the police, as well as by authorizing the use of informants in the

manner exemplified by *Hoffa* and *Lewis*. If the law gives no protection to the wrongdoer whose trusted accomplice is or becomes a police agent, neither should it protect him when that same agent has recorded or transmitted the conversations which are later offered in evidence to prove the State's case. See *Lopez* v. *United States*, 373 U. S. 427 (1963).

Inescapably, one contemplating illegal activities must realize and risk that his companions may be reporting to the police. If he sufficiently doubts their trustworthiness, the association will very probably end or never materialize. But if he has no doubts, or allays them, or risks what doubt he has, the risk is his. In terms of what his course will be, what he will or will not do or say, we are unpersuaded that he would distinguish between probable informers on the one hand and probable informers with transmitters on the other. Given the possibility or probability that one of his colleagues is cooperating with the police, it is only speculation to assert that the defendant's utterances would be substantially different or his sense of security any less if he also thought it possible that the suspected colleague is wired for sound. At least there is no persuasive evidence that the difference in this respect between the electronically equipped and the unequipped agent is substantial enough to require discrete constitutional recognition, particularly under the Fourth Amendment which is ruled by fluid concepts of "reasonableness."

Nor should we be too ready to erect constitutional barriers to relevant and probative evidence which is also accurate and reliable. An electronic recording will many times produce a more reliable rendition of what a defendant has said than will the unaided memory of a police agent. It may also be that with the recording in existence it is less likely that the informant will change

his mind, less chance that threat or injury will suppress unfavorable evidence and less chance that cross-examination will confound the testimony. Considerations like these obviously do not favor the defendant, but we are not prepared to hold that a defendant who has no constitutional right to exclude the informer's unaided testimony nevertheless has a Fourth Amendment privilege against a more accurate version of the events in question.

It is thus untenable to consider the activities and reports of the police agent himself, though acting without a warrant, to be a "reasonable" investigative effort and lawful under the Fourth Amendment but to view the same agent with a recorder or transmitter as conducting an "unreasonable" and unconstitutional search and seizure. Our opinion is currently shared by Congress and the Executive Branch, Title III, Omnibus Crime Control and Safe Streets Act of 1968, § 2510 *et seq.*, 82 Stat. 197, 212 *et seq.*, and the American Bar Association. ABA Project on Minimum Standards for Criminal Justice, Standards Relating to Electronic Surveillance § 4.1 (Final Draft 1971). It is also the result reached by prior cases in this Court. *On Lee, supra; Lopez* v. *United States, supra.*

No different result should obtain where, as in *On Lee* and the instant case, the informer disappears and is unavailable at trial; for the issue of whether specified events on a certain day violate the Fourth Amendment should not be determined by what later happens to the informer. His unavailability at trial and proffering the testimony of other agents may raise evidentiary problems or pose issues of prosecutorial misconduct with respect to the informer's disappearance, but they do not appear critical to deciding whether prior events invaded the defendant's Fourth Amendment rights.

II

The Court of Appeals was in error for another reason. In *Desist* v. *United States*, 394 U. S. 244 (1969), we held that our decision in *Katz* v. *United States* applied only to those electronic surveillances which occurred subsequent to the date of that deision. Here the events in question took place in the late 1965 and early 1966, long prior to *Katz*. We adhere to the rationale of *Desist*, see *Williams* v. *United States*, *ante*. It was error for the Court of Appeals to dispose of this case based on its understanding of the principles announced in the *Katz* case. The court should have judged this case by the pre-*Katz* law and under that law, as *On Lee* clearly holds, the electronic surveillance here involved did not violate White's rights to be free from unreasonable searches and seizures.

The judgment of the Court of Appeals is reversed.

It is so ordered.

MR. JUSTICE BLACK, while adhering to his views expressed in *Linkletter* v. *Walker*, 381 U. S. 618, 640 (1965), concurs in the judgment of the Court for the reasons set forth in his dissent in *Katz* v. *United States*, 389 U. S. 347, 364 (1967).

SUPREME COURT OF THE UNITED STATES

No. 13.—October Term, 1970

United States, Petitioner, v. James A. White.	On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[April 5, 1971]

Mr. Justice Brennan, concurring in result.

I agree that *Desist* v. *United States*, 394 U. S. [illegible] (1969), requires reversal of the judgment of the Court of Appeals. Therefore, a majority of the Court supports disposition of this case on that ground. However, my Brothers Douglas, Harlan, and White also debate the question whether *On Lee* v. *United States*, 343 U. S. 747 (1952), may any longer be regarded as sound law. My Brother White argues that *On Lee* is still sound law. My Brothers Douglas and Harlan argue that it is not. Neither position commands the support of a majority of the Court. For myself, I agree with my Brothers Douglas and Harlan. But I go further. It is my view that the reasoning of both my Brothers Douglas and Harlan compels the conclusion that *Lopez* v. *United States*, 373 U. S. 427 (1963), is also no longer sound law. In other words, it is my view that current Fourth Amendment jurisprudence interposes a warrant requirement not only in cases of third-party electronic monitoring (the situation in *On Lee* and in this case) but also in cases of electronic recording by a government agent of a face-to-face conversation with a criminal suspect, which was the situation in *Lopez*. For I adhere to the dissent in *Lopez*, 373 U. S., at 446–471, in which, to quote my Brother Harlan, *ante*, n. 12, "the doctrinal basis of our

subsequent Fourteenth Amendment decisions may be said to have had its genesis." *Katz* v. *United States*, 389 U. S. 347 (1967), adopted that "doctrinal basis" and thus, it seems to me, agreed with the argument in that dissent that "subsequent decisions and subsequent experience have sapped whatever vitality [*On Lee*] may once have had; that it should now be regarded as overruled" and that the situation in *Lopez* "is rationally indistinguishable." 373 U. S., at 447. The reasons in support of those conclusions are set forth fully in the *Lopez* dissent and need not be repeated here. It suffices to say that for those reasons I remain of the view that the Fourth Amendment imposes the warrant requirement in both the *On Lee* and *Lopez* situations.

SUPREME COURT OF THE UNITED STATES

No. 13.—October Term, 1970

United States, Petitioner, v. James A. White.	On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[April 5, 1971]

Mr. Justice Douglas, dissenting.

I

The issue in this case is clouded and concealed by the very discussion of it in legalistic terms. What the ancients knew as "eavesdropping," we now call "electronic surveillance"; but to equate the two is to treat man's first gunpowder on the same level as the nuclear bomb. Electronic surveillance is the greatest leveler of human privacy ever known. How most forms of it can be held "reasonable" within the meaning of the Fourth Amendment is a mystery. To be sure the Constitution and Bill of Rights are not to be read as covering only the technology known in the 18th century. Otherwise its concept of "commerce" would be hopeless when it comes to the management of modern affairs. At the same time the concepts of privacy which the Founders enshrined in the Fourth Amendment vanish completely when we slavishly allow an all-powerful government, proclaiming law and order, efficiency, and other benign purposes, to penetrate all the walls and doors which men need to shield them from the pressures of a turbulent life around them and give them the health and strength to carry on.

That is why a "strict construction" of the Fourth Amendment is necessary if every man's liberty and privacy are to be constitutionally honored.

When Franklin D. Roosevelt on May 21, 1940, authorized wiretapping in cases of "fifth column" activities and sabotage and limited "so far as possible to aliens," he said that "under ordinary and normal circumstances wire-tapping by Government agents should not be carried on for the excellent reason that it is almost bound to lead to abuse of civil rights." See Appendix I to this dissent. Yet as Judge Ferguson said in *United States* v. *Smith,* 321 F. Supp. 424, 429:

> ". . . the government seems to approach these dissident domestic organizations in the same fashion as it deals with unfriendly foreign powers. The government cannot act in this manner when only domestic political organizations are involved, even if those organizations espouse views which are inconsistent with our present form of government. To do so is to ride roughshod over numerous political freedoms which have long received constitutional protection. The government can, of course, investigate and prosecute criminal violations whenever these organizations, or rather their individual members, step over the line of political theory and general advocacy and commit illegal acts."

Today no one perhaps notices because only a small, obscure criminal is the victim. But every person is the victim, for the technology we exalt today is everyman's master. Any doubters should read Arthur R. Miller's; The Assault On Privacy (1971). After describing the monitoring of conversations and their storage in data banks, Professor Miller goes on to describe "human monitoring" which he calls the "ultimate step in mechanical snooping"—a device for spotting unorthodox or aberrational behavior across a wide spectrum. "Given the advancing state of both the remote sensory art and the capacity of computors to handle an uninterrupted and

synoptic data flow, there seems to be no physical barriers left to shield us from intrusion." *Id.*, at 46.

When one reads what is going on in this area today, our judicial treatment of the subject seems as remote from reality as the well-known Baron Parke was remote from the social problems of his day. See Chapman, "Big Brother" in the Justice Department, Progressive, April 1971, p. 27.

II

We held in *Berger* v. *New York*, 388 U. S. 41, that wiretapping is a search and seizure within the meaning of the Fourth Amendment and therefore must meet its requirements, *viz.*: there must be a prior showing of probable cause, the warrant authorizing the wiretap must particularly describe "the place to be searched and the persons or things to be seized," and that it may not have the breadth, generality, and long life of the general warrant against which the Fourth Amendment was aimed.

In *Katz* v. *United States*, 389 U. S. 347, we held that an electronic device, used without trespass onto any given enclosure (there a telephone booth), was a search for which a Fourth Amendment warrant was needed.[1] MR. JUSTICE STEWART, speaking for the Court, said: "Wherever a man may be, he is entitled to know that he will remain free from unreasonable searches, and seizures." *Id.*, at 359.

As a result of *Berger* and of *Katz*, both wiretapping and electronic surveillance through a "bug" or other device are now covered by the Fourth Amendment.

---

[1] See Greenawalt, The Consent Problem in Wiretapping and Eavesdropping, 68 Col. L. Rev. 189; Kitch, *Katz* v. *United States*; The Limits of the Fourth Amendment, 1968 Sup. Ct. Rev., p. 133; Police Undercover Agents, 37 Geo. Wash. L. Rev. 634; Electronic Surveillance: The New Standards, 35 Brooklyn L. Rev. 49.

The relaxing of constitutional requirements by the Executive Branch is apparent from the Appendices to this dissent.

There were prior decisions representing an opposed view. In *On Lee* v. *United States,* 343 U. S. 747, an undercover agent with a radio transmitter concealed on his person interviewed the defendant whose words were heard over a radio receiver by another agent down the street. The idea, discredited by *Katz,* that there was no violation of the Fourth Amendment because there was no trespass, was the core of the *On Lee* decision. *Id.,* pp. 751–754.

Lopez v. *United States,* 373 U. S. 427, was also pre-*Berger* and pre-*Katz.* The government agent there involved carried a pocket wire recorder which the Court said "was not planted by means of an unlawful physical invasion of petitioner's premises under circumstances which would violate the Fourth Amendment." *Id.,* at 439.

MR. JUSTICE BRENNAN, dissenting, stated the philosophy of *Katz* soon to be adopted:

> ". . . there is a qualitative difference between electronic surveillance, whether the agents conceal the devices on their persons or in walls or under beds, and conventional police strategems such as eavesdropping and disguise. The latter do not so seriously intrude upon the right of privacy. The risk of being overheard by an eavesdropper or betrayed by an informer or deceived as to the identity of one with whom one deals is probably inherent in the conditions of human society. It is the kind of risk we necessarily assume whenever we speak. But as soon as electronic surveillance comes into play, the risk changes crucially. There is no security from that kind of eavesdropping, no way of mitigating the risk, and so not even a residuum of true privacy . . . .
>
> "Electronic aids add a wholly new dimension to eavesdropping. They make it more penetrating,

more indiscriminate, more truly obnoxious to a free society. Electronic surveillance, in fact, makes the police omniscient; and police omniscience is one of the most effective tools of tyranny." 373 U. S., pp. 465–466.

It is urged by the Department of Justice that *On Lee* be established as the controlling decision in this field. I would stand by *Berger* and *Katz* and reaffirm the need for judicial supervision [2] under the Fourth Amendment of the use of electronic surveillance which, uncontrolled, promises to lead us into a police state.

These were wholly pre-arranged episodes of surveillance. The first was in the informant's home to which respondent had been invited. The second was also in the informer's home, the next day. The third was four days later at the home of the respondent. The fourth was in the informer's car two days later. Twelve days after that a meeting in the informer's home was intruded upon. The sixth occurred at a street rendezvous. The seventh was in the informer's home and the eighth in a restaurant owned by respondent's mother-in-law. So far as time is concerned there is no excuse for not seeking a warrant. And while there is always an effort involved in preparing affidavits or other evidence in support of a showing of probable cause, that burden was given constitutional sanction in the Fourth Amendment against the activities of the agents of George III. It was designed not to protect criminals but to protect everyone's privacy.

---

[2] *Osborn* v. *United States*, 385 U. S. 323, was held to be in that tradition, as the federal district judges, prior to the use of the recording device by the agent and with full knowledge of the alleged law violation involved, "authorized the use of a recording device for the narrow and particularized purpose of ascertaining the truth" of the charge. *Id.*, p. 330.

On Lee and *Lopez* are of a vintage opposed to *Berger* and *Katz*. However they may be explained, they are products of the old common-law notions of trespass. *Katz*, on the other hand, emphasized that with few exceptions "searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment . . . ." 389 U. S., at 357. *Camara* v. *Municipal Court*, 387 U. S. 523, put administrative searches under the Fourth Amendment. We held that administrative actions, like other searches, implicated officials in an invasion of privacy and that the Fourth Amendment was meant to guard against the arbitrariness of any such invasion. We said:

> ". . . We simply cannot say that the protections provided by the warrant procedure are not needed in this context; broad statutory safeguards are no substitute for individualized review, particularly when those safeguards may only be invoked at the risk of a criminal penalty." *Id.*, at 533.

In *Chimel* v. *California*, 395 U. S. 752, in considering the constitutionality of a search incident to an arrest we held that, while the area in the immediate reach of an arrestee is "reasonable" though made without a warrant, a search beyond that zone may generally be made "only under the authority of a search warrant." *Id.*, at 763. And in two "stop and frisk" cases, *Terry* v. *Ohio*, 392 U. S. 1, and *Davis* v. *Mississippi*, 394 U. S. 721, we held that any restraint of the person, however brief, was subject to judicial inquiry on "reasonableness" (392 U. S., at 19) and that "the Fourth Amendment governs all intrusions by agents of the public upon personal security . . . ." *Id.*, at 18 n. 15.

We have moved far away from the rationale of *On Lee* and *Lopez* and only a retrogressive step of large dimensions would bring us back to it.

The threads of thought running through our recent decisions are that these extensive intrusions into privacy made by electronic surveillance make self-restraint by law enforcement officials an inadequate protection, that the requirement of warrants under the Fourth Amendment is essential to a free society.[3]

Monitoring, if prevalent, certainly kills free discourse and spontaneous utterances. Free discourse—a First Amendment value—may be frivolous or serious, humble or defiant, reactionary or revolutionary, profane or in good taste; but it is not free if there is surveillance.[4]

[3] The tyranny of surveillance that is not supervised in the Fourth Amendment manner is told by Judge Gesell in *United States* v. *Jones*, 292 F. Supp. 1001, 1008–1009, where the competition between agencies and the uncontrolled activities of subordinates ended up with Government itself playing an ignoble role.

Cf. Standards Relating to Electronic Surveillance, American Bar Assoc. 1971, §§ 4.1, 5.2.

[4] Congressman Mikva of Illinois, in speaking of the spread of military surveillance of civilians—another facet of the problem in the instant case—recently said:

"At one point they referred to 'infiltrating public meetings' at which Senator Stevenson and I spoke, and I wondered how you 'infiltrate' a public meeting. Perhaps they wanted to compile evidence to be used in some future military court—evidence that I was disloyal to the military establishment because I suggested that we cut manpower by ten per cent last year, or because I voted against their appropriations in the two years I've been here.

"When they start investigating political figures, there is no place you can draw the line and maintain any kind of civilian control.

"We have become a fearful people. There was a time when we feared only our enemies abroad. Now we seem to be as fearful of our enemies at home, and depending on whom they talk to, those enemies can include people under thirty, people with foreign names, people of different races, people in the big cities. We have become a suspicious nation, as afraid of being destroyed from within as from without.

"Unfortunately, the manifestations of that kind of fear and suspicion are police-state measures." The Progressive, February 1971, pp. 19–20.

Free discourse liberates the spirit, though it may produce only froth. The individual must keep some facts concerning his thoughts within a small zone of people. At the same time he must be free to pour out his woes or inspirations or dreams to others. He remains the sole judge as to what must be said and what must remain unspoken. This is the essence of the idea of privacy implicit in the First and Fifth Amendments as well as in the Fourth.

The philosophy of the value of privacy reflected in the Fourth Amendment's ban on "unreasonable searches and seizures" has been forcefully stated by a former Attorney General of the United States:

> "Privacy is the basis of individuality. To be alone and be let alone, to be with chosen company, to say what you think, or don't think, but to say what you will, is to be yourself. Solitude is imperative, even in a high rise apartment. Personality develops from within. To reflect is to know yourself. Character is formed through years of self-examination. Without this opportunity, character will be formed largely by uncontrolled external social stimulations. Americans are excessively homogenized already.
>
> "Few conversations would be what they are if the speakers thought others were listening. Silly, secret, thoughtless and thoughtful statements would all be affected. The shear numbers in our lives, the anonymity of urban living and the inability to influence things that are important are depersonalizing and dehumanizing factors of modern life. To penetrate the last refuge of the individual, the precious little privacy that remains, the basis of individual dignity, can have meaning to the quality of our lives that we cannot foresee. In terms of present values, that meaning cannot be good.

"Invasions of privacy demean the individual. Can a society be better than the people composing it? When a government degrades its citizens, or permits them to degrade each other, however beneficient the specific purpose, it limits opportunities for individual fulfillment and national accomplishment. If America permits fear and its failure to make basic social reforms to excuse police use of secret electronic surveillance, the price will be dear indeed. The practice is incompatible with a free society." Ramsey Clark, Crime in America (1970), p. 287.

Now that the discredited decisions in *On Lee* and *Lopez* are resuscitated and revived, must everyone live in fear that every word he speaks may be transmitted or recorded [5] and later repeated to the entire world? I can

---

[5] Senator Edward Long, who intensively investigated wiretapping and "bugging" said:

"You would be amazed at the different ways you can now be 'bugged.' There is today a transmitter the size of an aspirin tablet which can help transmit conversations in your room to a listening post up to 10 miles away.

"An expert can devise a bug to fit into almost any piece of furniture in your room. And even if you find the bug, you will have no evidence of who put it there. A United States Senator was bugged by a transmitter secretly placed into a lamp which his wife was having fixed at the shop. When experts searched for the transmitter, it was gone.

"A leading electronics expert told my Subcommittee last year that wiretapping and bugging in industrial espionage triples every year. He said that new bugging devices are so small and cleverly concealed that it takes search equipment costing over one hundred thousand dollars and an expert with 10 years of field experience to discover them. Ten years ago, the same search for bugs could have been done with equipment costing only one-fourth as much.

"In California we found a businessman who had been so frightened by electronic eavesdropping devices which had been concealed in his office, that he is now spending thousands of dollars having his office

imagine nothing that has a more chilling effect on people speaking their minds and expressing their views on important matters. The advocates of that regime should spend some time in totalitarian countries and learn firsthand the kind of regime they are creating here.[6]

---

searched each day, taking his phone apart every morning, and stationing a special guard outside his office 24 hours a day.

"He is one of a growing number of men in industry who live in constant fear that what they say is being listened to by their competitor." 19–20 Adm. L. Rev. 442, 444. And see Long, The Intruders (1966).

[6] "A technological breakthrough in techniques of physical surveillance now makes it possible for government agents and private persons to penetrate the privacy of homes, offices, and vehicles; to survey individuals moving about in public places; and to monitor the basic channels of communication by telephone, telegraph, radio, television, and data line. Most of the 'hardware' for this physical surveillance is cheap, readily available to the general public, relatively easy to install, and not presently illegal to own. As of the 1960's, the new surveillance technology is being used widely by government agencies of all types and at every level of government, as well as by private agents for a rapidly growing number of businesses, unions, private organizations, and individuals in every section of the United States. Increasingly, permanent surveillance devices have been installed in facilities used by employees or the public. While there are defenses against 'outside' surveillance, these are so costly and complex and demand such constant vigilance that their use is feasible only where official or private matters of the highest security are to be protected. Finally, the scientific prospects for the next decade indicate a continuing increase in the range and versatility of the listening and watching devices, as well as the possibility of computer processing of recordings to identify automatically the speakers or topics under surveillance. These advances will come just at the time when personal contacts, business affairs, and government operations are being channeled more and more into electronic systems such as data-phone lines and computer communications." Westin, Privacy and Freedom, pp. 365–366 (1967).

III

The decision not to make *Katz* retroactive to any electronic surveillance which occurred prior to December 18, 1967 (the day we decided *Katz*), is not, in my view, a tenable one for the reasons stated by MR. JUSTICE HARLAN and me in our dissents in *Desist* v. *United States*, 394 U. S. 244, 255, 256.

APPENDIX I

THE WHITE HOUSE
WASHINGTON

May 21, 1940

CONFIDENTIAL

MEMORANDUM FOR THE
ATTORNEY GENERAL

I have agreed with the broad purpose of the Supreme Court decision relating to wire-tapping in investigations. The Court is undoubtedly sound both in regard to the use of evidence secured over tapped wires in the prosecution of citizens in criminal cases; and is also right in its opinion that under ordinary and normal circumstances wire-tapping by Government agents should not be carried on for the excellent reason that it is almost bound to lead to abuse of civil rights.

However, I am convinced that the Supreme Court never intended any dictum in the particular case which it decided to apply to grave matters involving the defense of the nation.

It is, of course, well known that certain other nations have been engaged in the organization of propaganda of so-called "fifth columns" in other countries and in preparation for sabotage, as well as in actual sabotage.

It is too late to do anything about it after sabotage, assassinations and "fifth column" activities are completed.

You are, therefore, authorized and directed in such cases as you may approve, after investigation of the need in each case, to authorize the necessary investigation agents that they are at liberty to secure information by listening devices direct to the conversation or other communications of persons suspected of subversive activities

against the Government of the United States, including suspected spies. You are requested furthermore to limit these investigations so conducted to a minimum and to limit them insofar as possible to aliens.

[SEAL] /s/ F. D. R.

APPENDIX II

ADMINISTRATIVELY CONFIDENTIAL
THE WHITE HOUSE
WASHINGTON

June 30, 1965

MEMORANDUM FOR THE HEADS OF
EXECUTIVE DEPARTMENTS
AND AGENCIES

I am strongly opposed to the interception of telephone conversations as a general investigative technique. I recognize that mechanical and electronic devices may sometimes be essential in protecting our national security. Nevertheless, it is clear that indiscriminate use of these investigative devices to overhear telephone conversations without the knowledge or consent of any of the persons involved, could result in serious abuses and invasions of privacy. In my view, the invasion of privacy of communications is a highly offensive practice which should be engaged in only where the national security is at stake. To avoid any misunderstanding on this subject in the Federal Government, I am establishing the following basic guidelines to be followed by all government agencies:

(1) No federal personnel is to intercept telephone conversations within the United States by any mechanical or electronic device, without the consent of one of the parties involved (except in connection with investigations related to the national security).

(2) No interception shall be undertaken or continued without first obtaining the approval of the Attorney General.

(3) All federal agencies shall immediately conform their practices and procedures to the provisions of this order.

Utilization of mechanical or electronic devices to overhear non-telephone conversations is an even more difficult problem, which raises substantial and unresolved questions of Constitutional interpretation. I desire that each agency conducting such investigations consult with the Attorney General to ascertain whether the agency's practices are fully in accord with the law and with a decent regard for the rights of others.

Every agency head shall submit to the Attorney General within 30 days a complete inventory of all mechanical and electronic equipment and devices used for or capable of intercepting telphonic conversations. In addition, such reports shall contain a list of any interceptions currently authorized and the reasons for them.

/s/ Lyndon B. Johnson

SUPREME COURT OF THE UNITED STATES

No. 13.—October Term, 1970

United States, Petitioner, v. James A. White. | On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[April 5, 1971]

Mr. Justice Harlan, dissenting.

The uncontested facts of this case squarely challenge the continuing viability of *On Lee* v. *United States*, 343 U. S. 747 (1952). As the plurality opinion of Mr. Justice White itself makes clear, important constitutional developments since *On Lee* mandate that we reassess that case, which has continued to govern official behavior of this sort in spite of the subsequent erosion of its doctrinal foundations. With all respect, my agreement with the majority ends at that point.

I think that a perception of the scope and role of the Fourth Amendment, as elucidated by this Court since *On Lee* was decided, and full comprehension of the precise issue at stake leads to the conclusion that *On Lee* can no longer be regarded as sound law. Nor do I think the date we decided *Katz* v. *United States*, 389 U. S. 347 (1967), can be deemed controlling both for the reasons discussed in my dissent in *Desist* v. *United States*, 394 U. S. 244, 256 (1969), and my separate opinion in *Williams* v. *United States* (and companion cases), — U. S. —, — (1971) (the case before us being here on *direct* review), and because, in my view, it requires no discussion of the holding in *Katz*, as distinguished from its underlying rationale as to the reach of the Fourth Amendment, to comprehend the constitutional infirmity of *On Lee*.

I

Before turning to matters of precedent and policy, several preliminary observations should be made. We deal here with the constitutional validity of instantaneous third-party electronic eavesdropping, conducted by federal law enforcement officers, without any prior judicial approval of the technique utilized, but with the consent and cooperation of a participant in the conversation,[1] and where the substance of the matter electronically overheard [2] is related in a federal criminal trial by those who eavesdropped as direct, not merely corroborative, evidence of the guilt of the nonconsenting party. The magnitude of the issue at hand is evidenced not simply by the obvious doctrinal difficulty of weighing such activity in the Fourth Amendment balance, but also, and more importantly, by the prevalance of police utilization of this technique. Professor Westin has documented in careful detail the numerous devices that make technologically feasible the Orwellian Big Brother. Of immediate relevance is his observation that "participant recording, in which one participant in a conversation or meeting, either a police officer or a cooperating party, wears a concealed device that records or broadcasts to

---

[1] I agree with the plurality opinion, *ante* n. 1, that the issue of the informer's consent to utilization of this technique is not properly before us. Whether persons can, consistent with constitutional prohibitions, be tricked or coerced into transmitting their conversations, with or without prior judicial approval, and, if not, whether other parties to the conversation would have standing to object to the admission against them of evidence so obtained, cf. *Alderman* v. *United States*, 394 U. S. 165 (1969), are questions upon which I express no opinion.

[2] In the case at hand agents were also surreptitiously placed in respondent's home at various times. No testimony by these agents was offered at trial.

others nearby . . . is used tens of thousands of times each year, particularly in cases involving extortion, conspiracy, narcotics, gambling, prostitution, corruption by police officials, . . . and similar crimes." [3]

Moreover, as I shall undertake to show later in this opinion, the factors that must be reckoned with in reaching constitutional conclusions respecting the use of electronic eavesdropping as a tool of law enforcement are exceedingly subtle and complex. They have provoked sharp differences of opinion both within and without the judiciary, and the entire problem has been the subject of continuing study by various governmental and nongovernmental bodies.[4]

---

[3] A. Westin—Privacy and Freedom 131 (1966). This investigative technique is also used to unearth "political" crimes. "Recordings of the private and public meetings of suspect groups have been growing. Police in Miami, Florida, used a hidden transmitter on a police agent to record statements made at meetings of a right-wing extremist group suspected of planning acts of terrorism. In 1964 a police undercover agent obtained recordings of incendiary statements by the leader of a Communist splinter movement in Harlem, at private meetings and at a public rally, which served as the basis for his conviction for attempting to overthrow the state government." *Ibid.*

[4] Prior to *Osborn* v. *United States*, 385 U. S. 323 (1966), and *Katz* the issue before us, if raised, was usually dismissed in a routine fashion with a citation to *On Lee*, buttressed by a citation to *Lopez* v. *United States*, 373 U. S. 427 (1963), with no attempt to distinguish the two cases despite the narrow rationale of the latter. See, *e. g.*, *United States* v. *Pasquinzo*, 334 F. 2d 74, 75 (CA6 1964); *Maddox* v. *United States*, 337 F. 2d 234 (CA5 1964); but cf. *United States* v. *Stone*, 232 F. Supp. 396 (ND Tex. 1964). The few authorities post-dating *Katz* have divided on the continued viability of the *On Lee* result, compare, *e. g.*, *United States* v. *Jones*, 292 F. Supp. 1001 (DC 1968), and cases cited therein, 292 F. Supp., at 1008, with *Dancy* v. *United States*, 390 F. 2d 370 (CA5 1968) (Judge Fahy dissenting); *United States* v. *Kaufer*, 406 F. 2d 550 (CA2 1969); *Fiedler* v. *New York*, 30 A. D. 2d 476 (CA4 Dept. 1968) (Justices Goldman and Bastow dissenting), aff'd without

Finally, given the importance of electronic eavesdropping as a technique for coping with the more deep-seated kinds of criminal activity, and the complexities that are encountered in striking a workable constitutional balance between the public and private interests at stake, I believe that the courts should proceed with specially measured steps in this field. More particularly, I think this Court should not foreclose itself from reconsidering doctrines that would prevent the States from seeking, inde-

---

opinion, 24 N. Y. 2d 960 (1969). Perhaps the most comprehensive treatments, examining both the case law and policy considerations underlying the precise issue—electronic surveillance with the consent of one of the parties—are by Professor Greenawalt, The Consent Problem in Wiretapping and Eavesdropping: Surreptitious Monitoring With the Consent of a Participant in Conversation, 68 Col. L. Rev. 189 (1968), and Professor Kitch, Katz v. United States: The Limits of the Fourth Amendment, The Supreme Court Review 133 (1968). For an interesting analysis of the impact of nonconsensual bugging on privacy and the role of prior judicial authorization see *Spritzer*, *infra*, n. 15. In addition see ABA Project on Minimum Standards for Criminal Justice, Standards Relating to Electronic Surveillance § 4.1 (Tent. Dr. 1968); Landynski, Search and Seizure and the Supreme Court 198–244 (1966); Schwartz, *supra*, n. 13, at 455, 495–496 (1969); T. Dash, R. Schwartz, R. Knowlton, The Eavesdroppers 421–441 (1959); Note, Eavesdropping, Informers, and the Right of Privacy: a Judicial Tightrope, 52 Cornell L. Q. 975 (1967); King, Electronic Surveillance and Constitutional Rights: Some Recent Developments and Observations, 33 Geo. Wash. L. Rev. 240 (1964); Note, Wiretapping and Electronic Surveillance—Title III of the Crime Control Act of 1968, *supra*, n. 3; Blakey and Hancock, A Proposed Electronic Surveillance Control Act, 43 Notre Dame Law. 657 (1968); Kamisar, The Wiretapping-Eavesdropping Problem: A Professor's View, 44 Minn. L. Rev. 891 (1960); Note, From Private Places to Personal Privacy: A Post-Katz Study of Fourth Amendment Protection, 43 N. Y. U. L. Rev. 968, 973–974 (1968); Scoular, Wiretapping and Eavesdropping Constitutional Development from Olmstead to Katz, 12 St. Louis L. J. 513 (1968); 20 Syracuse L. Rev. 791 (1969); 14 Vill. L. Rev. 758 (1969).

pendently of the niceties of federal restrictions as they may develop, solutions to such vexing problems, see *Mapp* v. *Ohio*, 367 U. S. 643 (1961), and *Ker* v. *California*, 374 U. S. 23 (1963), and see also *Berger* v. *New York*, 388 U. S. 41 (1967); *Baldwin* v. *New York*, 399 U. S. 66, 117 (1970) (dissenting opinion); *California* v. *Green*, 399 U. S. 149, 172 (1970) (concurring opinion). I also think that in the adjudication of federal cases, the Court should leave ample room for congressional developments.

II

On these premises I move to the problem of third-party "bugging." To begin by tracing carefully the evolution of Fourth Amendment doctrine in post-*On Lee* decisions has proved useful in several respects. It serves to cast in perspective both the issue involved here and the imperative necessity for reconsidering *On Lee* afresh. Additionally, a full exposition of the dynamics of the decline of the trespass rationale underlying *On Lee* strikingly illuminates the deficiencies of the plurality opinion's retroactivity analysis.

A

On Lee involved circumstances virtually identical to those now before us. There, government agents enlisted the services of Chin Poy, a former friend of Lee, who was suspected of engaging in illegal narcotics traffic. Poy was equipped with a "minifon" transmitting device which enabled outside government agents to monitor Poy's conversations with Lee. In the privacy of his laundry, Lee made damaging admissions to Poy which were overheard by the agents and later related at trial. Poy did not testify. Justice Jackson, writing for five Justices, held the testimony admissible. Without reaching the question of whether a conversation could be the subject of a "seizure" for Fourth Amendment purposes, as yet

an unanswered if not completely open question,[5] the Court concluded that in the absence of a trespass,[6] no constitutional violation had occurred.[7]

The validity of the trespass rationale was questionable even at the time the decision was rendered. In this respect *On Lee* rested on common-law notions and looked to a waning era of Fourth Amendment jurisprudence. Three members of the Court refused to join with Justice Jackson, and within 10 years the Court expressly disavowed an approach to Fourth Amendment questions that looked to common-law distinctions. See, *e. g.*, *Jones* v. *United States*, 362 U. S. 257 (1960); *Silverman* v. *United States*, 365 U. S. 505 (1961); *Lanza* v. *United States*, 370 U. S. 139 (1962).

It is, of course, true that the opinion in *On Lee* drew some support from a brief additional assertion that

---

[5] See *Goldman* v. *United States*, 316 U. S. 129 (1942). *Silverman* v. *United States*, 365 U. S. 505, made explicit that which was still unclear after *Goldman*: words overheard by trespass are subject to Fourth Amendment protection. See also *Wong Sun* v. *United States*, 371 U. S. 471 (1963).

[6] Justice Jackson rejected petitioner's contention that Poy's deception vitiated Lee's consent to his entry on the premises. 343 U. S., at 743.

[7] 343 U. S., at 752:

"The conduct of Chin Poy and Agent Lee did not amount to an unlawful search and seizure such as is proscribed by the Fourth Amendment. In *Goldman* v. *United States*, 316 U. S. 129 . . . , the agents had earlier committed a trespass in order to install a listening device within the room itself. Since the device failed to work, the Court expressly reserved decision as to the effect on the search-and-seizure question of a trespass in that situation. Petitioner in the instant case has seized upon that dictum, apparently on the assumption that the presence of a radio set would automatically bring him within the reservation if he can show a trespass.

"But petitioner cannot raise the undecided question, for here no trespass was committed. Chin Poy entered a place of business with the consent, if not by the implied invitation of the petitioner."

"eavesdropping on a conversation, with the connivance of one of the parties" raises no Fourth Amendment problem. 343 U. S., at 754. But surely it is a misreading of that opinion to view this unelaborated assertion as a wholly independent ground for decision. At the very least, this rationale needs substantial buttressing if it is to persist in our constitutional jurisprudence after the decisions I discuss below. Indeed, the plurality opinion in the present case, in greatly elaborating the point, tacitly recognizes the analytic inability of this bare hypothesis to support a rule of law so profoundly important to the proper administration of justice. Moreover, if this was the true rationale of *On Lee* from the outset, it is difficult to see the relevance of *Desist* to the resolution of the instant case, for *Katz* surely does not speak directly to the continued viability of that ground for decision. See *Katz* v. *United States*, 389 U. S. 347, 363 n. * (concurring opinion of WHITE, J.).

By 1963, when we decided *Lopez* v. *United States*, 373 U. S. 427 (1963), four members of the Court were prepared to pronounce *On Lee* and *Olmstead* v. *United States*, 277 U. S. 438 (1928), dead.[8] The pyre, they reasoned, had been stoked by decisions like *Wong Sun* v. *United States*, 371 U. S. 471 (1963), which, on the one hand, expressly brought verbal communication within the sweep of the Fourth Amendment,[9] and, on the other, re-

[8] Both Chief Justice Warren, in concurrence, 373 U. S., at 441, and MR. JUSTICE BRENNAN, who wrote a dissenting opinion in which he was joined by JUSTICES DOUGLAS and Goldberg, 373 U. S., at 446, were of the view that *Olmstead* and *On Lee* should be overruled. Cf. *United States* v. *Stone*, 232 F. Supp. 396 (ND Tex. 1964).

[9] While *Silverman* v. *United States*, 365 U. S. 505, would seem to have eliminated any lingering uncertainty on this score, cf. *Goldman* v. *United States*, 316 U. S. 129, n. 5, *supra*, *Wong Sun* articulated the unspoken premise of *Silverman*. "The exclusionary rule

enforced our *Silverman* and *Jones* decisions which "refused to crowd the Fourth Amendment into a Procrustean mold of local property law," 373 U. S., at 460.

Although the Court's decision in *Lopez* is cited by the Government as a reaffirmation of *On Lee*, it can hardly be thought to have nurtured the questionable rationale of that decision or its much-criticized ancestor, *Olmstead*. To the discerning lawyer *Lopez* could only give pause, not comfort. While the majority opinion, of which I was the author, declined to follow the course favored by the dissenting and concurring Justices by sounding the death knell for *Olmstead* and *On Lee*, our holding, despite an allusion to the absence "of an unlawful invasion of a constitutionally protected area," was bottomed on two premises: the corroborative use that was made of the tape recordings, which increased reliability in the fact-finding process, and the absence of a "risk" not fairly assumed by petitioner. The tape recording was made by a participant in the conversation and the opinion emphasized this absence of a third-party intrusion, expressly noting that there was "no electronic eavesdropping on a private conversation which Government agents

---

has traditionally barred from trial, tangible materials obtained either during or as a direct result of an unlawful invasion. It follows from our holding in *Silverman* v. *United States*, 365 U. S. 505, that the Fourth Amendment may protect against the overhearing of verbal statements as well as against more traditional seizure of 'papers and effects.' Similarly, testimony as to matters observed during an unlawful invasion has been excluded in order to enforce the basic constitutional policies. [Citation omitted.] Thus, verbal evidence which derives so immediately from an unlawful entry and unauthorized arrest as the officers' action in the present case is no less the 'fruit' of official illegality than the more common tangible fruits of unwarranted intrusion." 371 U. S., at 485. While I joined MR. JUSTICE CLARK's dissenting opinion, 371 U. S., at 498, our differences with the majority involved only their analysis of probable cause.

could not otherwise have overheard." 373 U. S., at 440.[10] As I point out in Part III of this opinion, it is one thing to subject the average citizen to the risk that participants in a conversation with him will subsequently divulge its contents to another, but quite a different matter to foist upon him the risk that unknown third-parties may be simultaneously listening in.

While *Lopez* cited *On Lee* without disavowal of its holding, 373 U. S., at 438, it is entirely accurate to say that we did not there reaffirm it.[11] No decision since *Lopez* gives a breath of life to the reasoning that led to the *On Lee* and *Olmstead* results, and it required little clairvoyance to predict the demise of the basic rationale of *On Lee* and *Olmstead* foreshadowed by our subsequent opinions in *Osborn* v. *United States*, 385 U. S. 323 (1966), and *Berger* v. *New York*, 388 U. S. 41 (1967).

Only three years after *Lopez*, MR. JUSTICE STEWART writing for the Court in *Osborn* v. *United States*, 385 U. S. 323, expressly abjured reliance on *Lopez* and, instead, approved identical conduct based on the "circumstances under which the tape recording was obtained in [that] case," facts that involved "using [a recorder] under the most precise and discriminate circumstances, circum-

---

[10] "Stripped to its essentials, petitioner's argument amounts to saying that he has a constitutional right to rely on possible flaws in the agent's memory, or to challenge the agent's credibility without being beset by corroborating evidence that is not susceptible of impeachment. For no other argument can justify excluding an accurate version of a conversation that the agent could testify to from memory. We think the risk that petitioner took in offering a bribe to Davis fairly included the risk that the offer would accurately be reproduced in court, whether by faultless memory or mechanical recording." 373 U. S., at 439.

[11] The Chief Justice and dissenters, concerned with the *possibility* that "the majority opinion *may be* interpreted as reaffirming *sub silentio* the result in *On Lee* v. *United States*," expressly repudiated it. 373 U. S., at 441 (first emphasis added).

stances which fully met the requirement of particularity which the dissenting opinion in *Lopez* found necessary." *Osborn* v. *United States, supra,* 385 U. S., at 327, 329.[12]

Since *Osborn* our decisions have shown no tolerance for the old dividing lines resting, as they did, on fiction and common-law distinctions without sound policy justification in the realm of values prohibited by the Fourth Amendment. Thus, in the Term following *Osborn,* in abolishing the "mere evidence rule" we announced that "the principal object of the Fourth Amendment is the protection of privacy rather than property," and once again noted the trend to "discard fictional and procedural barriers rested on property concepts." *Warden* v. *Hayden,* 387 U. S. 294, 304 (1967). That same Term the Court demonstrated the new flexiblity in Fourth Amendment doctrine when it held that the warrant protections would be applied to administrative searches. *Camara* v. *Municipal Court,* 387 U. S. 523 (1967).

Certainly if *Osborn, Warden,* and *Camara* did not plainly draw into question the vigor of earlier precedents, *Berger* v. *New York,* 388 U. S. 41, did, and expunged any remnants of former doctrine which might have been

---

[12] In a footnote the Court in *Osborn* outlined a new approach, foreshadowed by MR. JUSTICE BRENNAN'S *Lopez* dissent, in which the doctrinal basis of our subsequent Fourth Amendment decisions may be said to have had its genesis:

"The requirements of the Fourth Amendment are not inflexible, or obtusely unyielding to the legitimate needs of law enforcement. It is at least clear that 'the procedure of antecedent justification before a magistrate that is central to the Fourth Amendment,' [citations omitted] could be made a precondition of lawful electronic surveillance . . . ." *Osborn* v. *United States,* 385 U. S. 323, 330, n. 9, quoting MR. JUSTICE BRENNAN'S dissenting opinion in *Lopez* v. *United States,* 373 U. S., at 464.

Judge Gesell in reviewing the precedents has recently concluded that it was *Katz,* read in conjunction with *Osborn* that buried *On Lee. United States* v. *Jones,* 292 F. Supp. 1001, 1008 (DC 1968).

thought to have survived *Osborn* and *Warden*.[13] There, the Court, following a path opened by Justice Brandeis' dissent in *Olmstead*, and smoothed in *Osborn* and *Camara*, expressed concern about scientific developments that have put within the reach of the Government the private communications of "anyone in almost any given situation," 388 U. S., at 47; it left no doubt that, as a general principle, electronic eavesdropping was an invasion of privacy and that the Fourth Amendment prohibited unsupervised "bugging." Disturbed by the extent of intrusion which "by its very nature . . . is broad in scope," and noting that "few threats to liberty exist which are greater than that posed by the use of eavesdropping devices," the Court brought to life the principle of reasonableness adumbrated in *Osborn*. Justice Clark, writing for the majority, reiterated the new approach:

> "the 'indiscriminate use of such [bugging] devices in law enforcement raises grave constitutional questions under the Fourth and Fifth Amendments,' and imposes 'a heavier responsibility on this Court in its supervision of the fairness of procedures . . . .'" 388 U. S., at 56, quoting from *Osborn* v. *United States*, 385 U. S. 323, 329, n. 7.

Nor did the Court waiver in resolve in the face of respondent's dire prediction that "neither a warrant nor a statute authorizing eavesdropping can be drawn so as to meet the Fourth Amendment's requirements."[14] It

---

[13] See Schwartz, The Legitimation of Electronic Eavesdropping: The Politics of "Law and Order," 67 Mich. L. Rev. 455, 458–459 (1969).

[14] My principal disagreement with the Court in *Berger* involved the wisdom of reviewing the New York statute on its face rather than focusing on the facts and circumstances of the particular case, and the exposition of the appropriate application of warrant principles to eavesdropping situations. 388 U. S., at 96–106.

was said that "If that be true then the 'fruits' of eavesdropping devices are barred under the Amendment." 388 U. S., at 63.[15]

If *Berger* did not flatly sound a dirge for *Olmstead*, it articulated principles that led MR. JUSTICE DOUGLAS, by way of concurrence, to comment on its quiet burial. 388 U. S., at 64 (concurring opinion). While it was left to *Katz* to peform the last rites, that decision inevitably followed from *Osborn* and *Berger*. The *Berger* majority's affirmative citation of *On Lee* for the principle that "under specific conditions and circumstances" eavesdropping may be lawful, 388 U. S., at 63, serves only to underscore the emerging operative assumptions: that the particular circumstances of each case will be scrutinized to the end of ascertaining the reasonableness of the search, and that will depend in large measure on whether prior judicial authorization, based on a particularized showing, has been obtained. *Katz* v. *United States, supra.*

Viewed in perspective, then, *Katz* added no new dimension to the law. At most it was a formal dispatch of *Olmstead* and the notion that such problems may usefully be resolved in the light of trespass doctrine, and, of course, it freed from speculation what was already evident, that *On Lee* was completely open to question.

B

But the decisions of this Court since *On Lee* do more than demonstrate that the doctrine of that case is wholly open for reconsideration, and has been since well before *Katz* was decided. They also establish sound general principles for application of the Fourth Amendment that were either dimly perceived or not fully worked out

[15] Cf. Spritzer, Electronic Surveillance By Leave of the Magistrate: The Case in Opposition, 118 U. Pa. L. Rev. 169 (1969).

at the time of *On Lee*. I have already traced some of these principles in Part II, A, *supra:* that verbal communication is protected by the Fourth Amendment, that the reasonableness of a search does not depend on the presence or absence of a trespass, and that the Fourth Amendment is principally concerned with protecting interests of privacy, rather than property rights.

Especially when other recent Fourth Amendment decisions, not otherwise so immediately relevant, are read with those already discussed, the primacy of an additional general principle becomes equally evident: official investigatory action that impinges on privacy must typically, in order to be constitutionally permissible, be subjected to the warrant requirement. Particularly significant in this regard are *Camara* v. *Municipal Court,* 387 U. S. 523 (1967); *Terry* v. *Ohio,* 392 U. S. 1 (1968), and *Chimel* v. *California,* 395 U. S. 752 (1969).

In *Camara* the Court brought under the Fourth Amendment administrative searches that had once been thought to be without its sweep. In doing so the opinion emphasized the desirability of establishing in advance those circumstances that justified the intrusion into a home and submitting them for review to an independent assessor,[16] principles that this Court has always deemed to be at the core of Fourth Amendment protections.[17]

[16] See *Beck* v. *Ohio,* 379 U. S. 89, 96 (1964), where the Court emphasized the importance of "an objective predetermination" uncomplicated by a presentation not "subtly influenced by the familiar shortcomings of hindsight judgment."

[17] The classic exposition of the purposes and importance of the warrant requirement is to be found in the opinion of Mr. Justice Jackson in his opinion for the Court in *Johnson* v. *United States,* 333 U. S. 10, 13–14:

"The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn

In bringing such searches within the ambit of the warrant requirement, *Camara* rejected the notion that the "less hostile nature" of the search relegated this invasion of privacy to the "periphery" of Fourth Amendment concerns. The central consideration was, the Court concluded, that these administrative actions, no less than the typical search, involved government officials in an invasion of privacy, and that it was against the possible arbitrariness of invasion that the Fourth Amendment with its warrant machinery was meant to guard. *Berger* and *Katz* built, as noted earlier, on *Osborn* v. *United States, supra,* and *Camara,* and gave further expression to the principle.[18] It was not enough that the Government's agents acted with restraint, for reasonableness must in the first instance be judged in a detached realm.[19]

---

by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime . . . . The right of officers to thrust themselves into a home is . . . a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance. When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent."

See also *Terry* v. *Ohio,* 392 U. S. 1 (1968); *United States* v. *Ventresca,* 380 U. S. 102 (1965); *Aguilar* v. *Texas,* 378 U. S. 108 (1964); *Wong Sun* v. *United States,* 371 U. S. 471 (1963); *Chapman* v. *United States,* 365 U. S. 610 (1961); *Jones* v. *United States,* 362 U. S. 257 (1960); *Jones* v. *United States,* 357 U. S. 493 (1958); *Giordenello* v. *United States,* 357 U. S. 480 (1958); *United States* v. *Jeffers,* 342 U. S. 48 (1948); *McDonald* v. *United States,* 335 U. S. 451 (1948); *Trupiano* v. *United States* 334 U. S. 699 (1948); *United States* v. *Lefkowitz,* 285 U. S. 452 (1932); *Agnello* v. *United States,* 269 U. S. 20 (1925).

[18] See Part II, A, *supra.* See *United States* v. *Jones,* 292 F. Supp. 1001 (DC 1968).

[19] "Over and over again this Court has emphasized that the mandate of the [Fourth] Amendment requires adherence to judicial processes, *United States* v. *Jeffers,* 342 U. S. 48, 51, and that searches conducted outside the judicial process, without prior ap-

The scope and meaning of the rule have emerged with even greater clarity by virtue of our holdings setting the boundaries for the exceptions. Recently, in *Chimel* v. *California*, 395 U. S. 752 (1969), we reiterated the importance of the prior independent determination of a neutral magistrate and underscored its centrality to the reasonableness requirement of the Fourth Amendment, and abandoned the holdings of *Harris* v. *United States*, 331 U. S. 145 (1947), and *Rabinowitz* v. *United States*, 339 U. S. 56 (1950). We were concerned by the breadth of searches occasioned by the *Rabinowitz* rule which frequently proved to be an invitation to a hunting expedition. Searches incident to arrest, we held, must be confined to a locus no greater than necessary to prevent injury to the arresting officer or destruction of evidence. 395 U. S., at 763, 767; cf. *Terry* v. *Ohio*, 392 U. S. 1.

To complete the tapestry, the strands of doctrine reflected in the search cases must be interwoven with the Court's other contemporary holdings. Most significant are *Terry* v. *Ohio*, *supra*, and *Davis* v. *Missis-*

---

proval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." *Katz* v. *United States*, 389 U. S., at 356–357.

The warrant procedure need not always entail an inquiry into the existence of probable cause in the usual sense. Cf. *Camara* v. *Municipal Court*. For example, where an informer is being sent in to investigate a dangerous crime, and there is reason to believe his person would be in danger, monitoring might be justified and a warrant issued even though no probable cause existed to believe the particular meeting would provide evidence of particular criminal activity. Cf. *Warden* v. *Hayden*, 387 U. S. 294, 298 (1967); *McDonald* v. *United States*, 335 U. S. 451, 455–456 (1948); *Johnson* v. *United States*, 333 U. S. 10, 14–15 (1948); *Ker* v. *California*, 374 U. S. 23 (1963); *Trupiano* v. *United States*, 334 U. S. 699 (1948), all taking the view that exceptions to the warrant requirement may be made in narrowly defined special circumstances.

sippi, 394 U. S. 721 (1969), which were also harbingers of the new thrust in Fourth Amendment doctrine. There the Court rejected the contention that only an arrest triggered the "incident-to-arrest" exception to the warrant requirement of the Fourth Amendment, and held that any restraint of the person, however brief and however labeled, was subject to a reasonableness examination. 392 U. S., at 19. The controlling principle is "to recognize that the Fourth Amendment governs all intrusions by agents of the public upon personal security, and to make the scope of the particular intrusion, in light of the exigencies of the case, a central element in the analysis of reasonableness." 392 U. S., at 18, n. 18. See also *Davis* v. *Mississippi*, 394 U. S., at 727.[20]

III

A

That the foundations of *On Lee* have been destroyed does not, of course, mean that its result can no longer stand. Indeed, the plurality opinion today fastens upon our decisions in *Lopez*, *Lewis* v. *United States*, 385 U. S. 206 (1966), and *Hoffa* v. *United States*, 385 U. S. 293 (1966), to resist the undercurrents of more recent cases emphasizing the warrant procedure as a safeguard to privacy. But this category provides insufficient support. In each of these cases the risk the general populace faced was different from that surfaced by the instant case. No surreptitious third ear was present, and in each opinion that fact was carefully noted.

[20] I do not consider *Chambers* v. *Maroney*, 399 U. S. 42 (1970), a retreat from the general proposition established by *Katz* and *Chimel*. While I disagreed with the Court, see my dissenting opinion, 399 U. S., at 55, moving vehicles have always presented a special Fourth Amendment problem. Compare *Carroll* v. *United States*, 267 U. S. 132 (1923), with *Agnello* v. *United States*, 269 U. S. 20 (1925).

In *Lewis*, a federal agent posing as a potential purchaser of narcotics gained access to petitioner's home and there consummated an illegal sale, the fruits of which were admitted at trial along with the testimony of the agent. Chief Justice Warren, writing for the majority, expressly distinguished the third-party overhearing involved, by way of example, in a case like *Silverman* v. *United States*, *supra*, noting that "there the conduct proscribed was that of eavesdroppers, unknown and unwanted intruders who furtively listened to conversations occurring in the privacy of a house." 385 U. S., at 212. Similarly in *Hoffa*, MR. JUSTICE STEWART took care to mention that "surreptitious" monitoring was not there before the Court, and so too, in *Lopez*, *supra*.

The plurality opinion seeks to erase the crucial distinction between the facts before us and these holdings by the following reasoning: if A can relay verbally what is revealed to him by B (as in *Lewis* and *Hoffa*), or record and later divulge it (as in *Lopez*), what difference does it make if A conspires with another to betray B by contemporaneously transmitting to the other all that is said? The contention is, in essence, an argument that the distinction between third-party monitoring and *other* undercover techniques is one of form and not substance. The force of the contention depends on the evaluation of two separable but intertwined assumptions: first, that there is no greater invasion of privacy in the third-party situation, and, second, that uncontrolled consensual surveillance in an electronic age is a tolerable technique of law enforcement, given the values and goals of our political system.[21]

---

[21] Professor Westin has observed:

"It is obvious that the political system in each society will be a fundamental force in shaping its balance of privacy, since certain patterns of privacy, disclosure, and surveillance are functional neces-

The first of these assumptions takes as a point of departure the so-called "risk analysis" approach of *Lewis*, and *Lopez*, and to a lesser extent *On Lee*, or the expectations approach of *Katz*. See discussion Part II, *supra*. While these formulations represent an advance over the unsophisticated trespass analysis of the common law, they too have their limitations and can, ultimately, lead to the substitution of words for analysis.[22] The analysis must, in my view, transcend the search for subjective expectations or legal attribution of assumptions of risk. Our expectations, and the risks we assume, are in large part reflections of laws that translate into rules the customs and values of the past and present.

Since it is the task of the law to form and project, as well as mirror and reflect, we should not, as judges, merely recite the expectations and risks without examining the desirability of saddling them upon society. The critical question, therefore, is whether under our system of government, as reflected in the Constitution, we should impose on our citizens the risks of the electronic listener or observer without at least the protection of a warrant requirement.

This question must, in my view, be answered by assessing the nature of a particular practice and the likely extent of its impact on the individual's sense of security balanced against the utility of the conduct as a technique of law enforcement. For those more extensive intrusions that significantly jeopardize the sense of security which is the paramount concern of Fourth Amendment liberties, I am of the view that more than self-restraint by law enforcement officials is required and at the least warrants

---

sities for particular kinds of political regime. This is shown most vividly by contrasting privacy in the democratic and the totalitarian state." Science, Privacy, and Freedom 23 (1966).

[22] See *Kitch*, *supra*, n. 4, at 141–142, 150–152.

should be necessary. Cf. *Terry* v. *Ohio, supra; Davis* v. *Mississippi, supra.*

B

The impact of the practice of third-party bugging, must, I think, be considered such as to undermine that confidence and sense of security in dealing with one another that is characteristic of individual relationships between citizens in a free society. It goes beyond the impact on privacy occasioned by the ordinary type of "informer" investigation upheld in *Lewis* and *Hoffa.* The argument of the plurality opinion, to the effect that it is irrelevant whether secrets are revealed by the mere tattletale or the transistor, ignores the differences occasioned by third-party monitoring and recording which insures full and accurate disclosure of all that is said, free of the possibility of error and oversight that inheres in human reporting.

Authority is hardly required to support the proposition that words would be measured a good deal more carefully and communication inhibited if one expected his conversations were being transmitted and transcribed. Were third-party bugging a prevalent practice, it might well smother that spontaneity—reflected in frivolous, impetuous, sacrilegious, and defiant discourse—that liberates daily life.[23] Much off-hand exchange is easily for-

---

[23] Greenawalt, *supra,* n. 4; Note, Eavesdropping, Informers, and the Right of Privacy: A Judicial Tightrope, 52 Cornell L. Q. 975, 983 (1967); Westin, *supra,* n. 3, at 390.

Professor Westin, in projecting the consequences of unsupervised participant monitoring, has observed:

"[E]avesdropping with the consent of one party . . . has been the basic charter for private-detective taps and bugs, for 'owner' eavesdropping on facilities that are used by members of the public, and for much free-lance police eavesdropping. Allowing eavesdropping with the consent of one party would destroy the statutory

gotten and one may count on the obscurity of his remarks, protected by the very fact of a limited audience, and the likelihood that the listener will either overlook or forget what is said, as well as the listener's inability to reformulate a conversation without having to contend with a documented record.[24] All these values are sacrificed by

---

plan of limiting the offenses for which eavesdropping by device can be used and insisting on a court-order process. And as technology enables every man to carry his micro-miniaturized recorder everywhere he goes and allows every room to be monitored surreptitiously by built-in equipment, permitting eavesdropping with the consent of one party would be to sanction a means of reproducing conversation that could choke off much vital social exchange."

See also separate views of Senator Hart set forth in S. Rep. No. 1097, at 175, *infra*, n. 26; Proposed Legislation on Wiretapping and Eavesdropping after *Berger* v. *New York* and *Katz* v. *United States*, 7 Bulletin of the Association of the Bar of the City of New York 1, 3, 22–26.

[24] From the same standpoint it may also be thought that electronic recording by an informer of a face-to-face conversation with a criminal suspect, as in *Lopez*, should be differentiated from third-party monitoring, as in *On Lee* and the case before us, in that the latter assures revelation to the Government by obviating the possibility that the informer may be tempted to renege in his undertaking to pass on to the Government all that he has learned. While the continuing vitality of *Lopez* is not drawn directly into question by this case, candor compels me to acknowledge that the views expressed in this opinion may impinge upon that part of the reasoning in *Lopez* which suggested that a suspect has no right to anticipate unreliable testimony. I am now persuaded that such an approach misconceives the basic issue, focusing, as it does, on the interests of a particular individual rather than evaluating the impact of a practice on the sense of security that is the true concern of the Fourth Amendment's protection of privacy. Distinctions do, however, exist between *Lopez*, where a known government agent uses a recording device, and this case which involves third-party overhearing. However unlikely that the participant recorder will not play his tapes, the fact of the matter is that in a third-party situation the intrusion is instantaneous. Moreover differences in the prior relationship between the investigator and the suspect may provide a focus for future distinctions. See Greenawalt, *supra*, n. 4.

a rule of law that permits official monitoring of private discourse limited only by the need to locate a willing assistant.

It matters little that consensual transmittals are less obnoxious than wholly clandestine eavesdrops. This was put forward as justification for the conduct in *Boyd* v. *United States*, where the Government relied on mitigating aspects of the conduct in question. The Court, speaking through Justice Bradley, declined to countenance literalism.

> "Though the proceeding in question is divested of many of the aggravating incidents of actual search and seizure, yet, as before said, it contains their substance and essence, and effects their substantial purpose. It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from modes of legal procedure." 116 U. S., at 635.

Finally, it is too easy to forget—and, hence, too often forgotten—that the issue here is whether to interpose a search warrant procedure between law enforcement agencies engaging in electronic eavesdropping and the public generally. By casting its "risk analysis" solely in terms of the expectations and risks that "wrongdoers" or "one contemplating illegal activities" ought to bear, the plurality opinion, I think, misses the mark entirely. *On Lee* does not simply mandate that criminals must daily run the risk of unknown eavesdroppers prying on their private affairs; it subjects each and every law-abiding member of society to that risk. The very purpose of interposing the Fourth Amendment warrant requirement is to redistribute the privacy risks throughout society in a way that produces the results the plurality opinion ascribes to the *On Lee* rule. Abolition of *On Lee* would

not end electronic eavesdropping. It would prevent public officials from engaging in that practice unless they first had probable cause to suspect an individual of involvement in illegal activities and had tested their version of the facts before a detached judicial officer. The interest *On Lee* fails to protect is the expectation of the ordinary citizen, who has never engaged in illegal conduct in his life, that he may carry on his private discourse freely, openly, and spontaneously without measuring his every word against the connotations it might carry when instantaneously heard by others unknown to him and unfamiliar with his situation or analyzed in a cold, formal record played days, months, or years after the conversation. Interposition of a warrant requirement is designed not to shield "wrongdoers," but to secure a measure of privacy and a sense of personal security throughout our society.

The Fourth Amendment does, of course, leave room for the employment of modern technology in criminal law enforcement, but in the stream of current developments in Fourth Amendment law I think it must be held that third-party electronic monitoring, subject only to the self-restraint of law enforcement officials, has no place in our society.

IV

I reach these conclusions notwithstanding seemingly contrary views espoused by both Congress and an American Bar Association study group.[25] Both the ABA

[25] See ABA Project, *supra*, n. 4. The commentary states at the outset "This standard reflects the prevailing law." The drafters apparently take as their starting point the risk analysis approach, relying on cases holding that contents of letters may be revealed where otherwise lawfully obtained. *Stroud* v. *United States*, 251 U. S. 15 (1919); *Ex parte Jackson*, 96 U. S. 727, 737 (1877); see also Blakey and Hancock, A Proposed Electronic Surveillance Control Act, *supra*, n. 4, at 663, n. 11. The various state provisions are set forth in Greenawalt, *supra*, n. 4, at 207–211.

study and Title III of the Omnibus Crime Control and Safe Streets Act of 1968, § 2510 *et seq.*, 82 Stat. 197, 212 *et seq.*, appear to reflect little more than this Court's prior decisions. Indeed, the comprehensive provisions of Title III are evidence of the extent of congressional concern with the impact of electronic surveillance on the right to privacy. This concern is further manifested in the introductory section of the Senate's Committee Report.[26] Although § 2511 (2)(c) of the Act exempts consensual and participant monitoring by law enforcement agents from the general prohibitions against surveillance without prior judicial authorization and makes the fruits admissible in court, see § 2515, congressional *malaise* with such conduct is evidenced by the contrastingly limited endorsement of consensual surveillance carried out by private individuals.[27] While individual congressmen expressed concern about and criticized the provisions for unsupervised consensual electronic surveillance contained in § 2515,[28] the Senate Committee Report comment, to the effect that "it [2511 (2)(c)] largely represents existing law," *id.*, at 93–94, followed by citations to *On Lee* and *Lopez*,[29] strongly suggests that the provisions represent not intractable approval of these practices, but rather an intention to adopt these holdings and to leave to the courts the task of determining their viability in light of later holdings such as *Berger*, *Osborn*, and *Katz*.[30]

---

[26] See S. Rep. No. 1097, at 69 (90th Cong., 2d Sess., 1968).

[27] See § 2515 (2)(d), which prohibits nongovernmental recording and listening when the "communication is intercepted for the purpose of committing a criminal or tortious act in violation of the Constitution or laws of the United States or of any state or for the purpose of committing any other injurious act."

[28] See, *id.*, at 175 (remarks of Senator Hart), S. 4858–4859, 6097–6099, May 22, 1968 Cong. Rec.

[29] S. Rep. No. 1097, *supra* n. 26, at 93–94.

[30] Indeed, the plain thrust of Title III appears to be to accommodate the holdings of *Berger* and *Katz*, and provides considerable reassurance to me in adopting the views expressed herein which

I find in neither the ABA study nor Title III any justification for ignoring the identifiable difference—albeit an elusive one in the present state of knowledge—between the impact on privacy of single-party informer bugging and third-party bugging, which in my opinion justifies drawing the constitutional line at this juncture between the two as regards the necessity for obtaining a warrant. Recognition of this difference is, at the very least, necessary to preserve the openness which is at the core of our traditions and is secure only in a society that tolerates official invasion of privacy simply in circumscribed situations.

The Fourth Amendment protects these traditions, and places limitations on the means and circumstances by which the Government may collect information about its citizens by intruding into their personal lives. The spirit of the principle is captured by the oft-quoted language of *Boyd* v. *United States*, 116 U. S. 616, 630 (1886).

> "The principles laid down in this opinion [speaking of *Entick* v. *Carrington*] affect the very essence of constitutional liberty and security. They reach farther than the concrete form of the case then before the court, with its adventitious circumstances; they

---

would doubtless, without more, cast a cloud upon the constitutionality of § 2511. Since the Title III question has been neither briefed nor argued as this case arose prior to its enactment, I would expressly reserve judgment should it prove upon further study that Congress had an affirmative intention to restrict warrant requirements to nonconsensual surveillance. We would then have to face the question, summarily dealt with in another context in *Katzenbach* v. *Morgan*, 384 U. S. 641, 651 n. 10 (1966), what deference should be given a congressional determination that certain procedures not plainly violations of due process, should be permitted. See Greenawalt, *supra*, n. 4, at 232, n. 207. Whether Congress may place restrictions on bugging by local law enforcement not mandated by the Fourteenth Amendment is also an unanswered question. See Spritzer, *supra*, n. 15, at 177, n. 46.

> apply to all invasions on the part of the government and its employees of the sanctity of a man's home and the privacies of his life. It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offence; but it is the invasion of his indefeasible right of personal security . . . ."

What this means is that the burden of guarding privacy in a free society should not be on its citizens; it is the Government that must justify its need to electronically eavesdrop.

V

Not content to rest upon the proposition that *On Lee* remains sound law, the plurality opinion would also hold that the Court of Appeals erred further in disposing "of this case on its understanding of the principles announced in the *Katz* case," *ante*, at 9, because *Desist* v. *United States*, 394 U. S. 244 (1969), held that *Katz* governed only governmental conduct occurring after the decision in *Katz*. It is difficult to know where to begin to analyze such a truly extraordinary assertion respecting the operation of the judicial process.

Because this case is here on direct review, even were the issues squarely controlled by *Katz*, I would unhesitatingly apply here the rule there adopted, for the reasons first expressed in my dissent in *Desist*, 394 U. S., at 256, and elaborated in my separate opinion in *Williams* v. *United States* (and companion cases), — U. S. —, — (1971). I see no purpose in repeating at this point the analysis I set forth in those opinions. Suffice it to say that, in *Desist*, I went to some length to point out, by discussing a hypothetical proposition, that the failure to apply any new decision by this Court to cases which had not yet run their course on direct review was inconsistent with the case-by-case approach to constitutional

decision and with the proper relationship of this Court to the lower federal courts. In particular, I noted that the logic of *Desist* suggested that it would constitute error for a lower federal court to adopt a new constitutional rule which this Court subsequently approved. 394 U. S., at 259. Today's opinion stands as eloquent evidence of that defect.

Indeed, I find this decision even more troubling than *Desist*. For the errors of *Desist* are not merely repeated here; they are plainly compounded. Upon the plurality opinion's own analysis of the instant case, it is clear that *Katz* has no direct relevance to the present viability of *On Lee*. "Katz involved no revelation to the Government by a party to conversations with the defendant nor did the Court indicate in any way that a defendant has a justifiable and constitutionally protected expectation that a person with whom he is conversing will not then or later reveal the conversation to the police." *Ante*, at 3. As I have already shown, one need not cite *Katz* to demonstrate the inability of *On Lee* to survive recent developments without at least substantial reformulation. To hold, then, that a mere citation of *Katz*, or drawing upon the philosophical underpinnings of that case in order to employ a general constitutional approach in tune with that of the decisions of this Court, conflicts with the holding of *Desist* is to let this obsession with pospectivity run riot.

Apparently *Desist* is now to be understood as holding that all lower federal courts are disabled from adjudicating on their merits all allegations of Fourth Amendment error not squarely supported by a prior decision of this Court. If so, one wonders what purpose is served by providing intermediate appellate review of constitutional issues in the federal criminal process. We must not forget that this Court is not the only tribunal in the entire federal system charged with a responsibility for

the nurture and development of the Fourth Amendment. It is one thing to disable all federal courts, including this Court, from applying the settled law of the land to cases and controversies before them—as *Desist* does with *Katz*—and at least another giant step backward to preclude lower courts from resolving wholly disparate controversies in the light of constitutional principles. Can it be seriously contended, as the plurality opinion necessarily implies, that the Court of Appeals should not be reversed today on these alternative grounds had it simply omitted to discuss *Katz*? To force lower federal courts to adjudicate controversies either mechanistically or disingenuously is for me indefensible. Yet this is precisely what the plurality opinion does with its assertion that it is error for lower courts to "dispose" of a case based on their "understanding of the principles announced" in *Katz* for the next year or so.

I would hold that *On Lee* is no longer good law and affirm the judgment below.

SUPREME COURT OF THE UNITED STATES

No. 13.—October Term, 1970

United States, Petitioner, *v.* James A. White.	On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[April 5, 1971]

Mr. Justice Marshall, dissenting.

I am convinced that the correct view of the Fourth Amendment in the area of electronic surveillance is one that brings the safeguards of the warrant requirement to bear on the investigatory activity involved in this case. In this regard I agree with the dissents of Mr. Justice Douglas and Mr. Justice Harlan. In short, I believe that *On Lee* v. *United States*, 343 U. S. 747 (1952), cannot be considered viable in light of the constitutional principles articulated in *Katz* v. *United States*, 389 U. S. 347 (1967), and other cases. And for reasons expressed by Mr. Justice Fortas in dissent in *Desist* v. *United States*, 394 U. S. 244 (1969), I do not think we should feel constrained to employ a discarded theory of the Fourth Amendment in evaluating the governmental intrusions challenged here.